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1 - VOLUME 5 -

2 IN THE UNITED STATES DISTRICT COURT

3 IN AND FOR THE DISTRICT OF DELAWARE

4 - - -

5 NOX MEDICAL EHF, : CIVIL ACTION

6 Plaintiff, :

7 vs. :

8 NATUS NEUROLOGY, INC., :

9 Defendant. : NO. 15-709 (RGA)

10 - - -

11 Wilmington, Delaware

12 Monday, May 7, 2018

13 9:30 o'clock, a.m.

14 - - -

15 BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J., and a
16 jury

17 - - -

18 APPEARANCES:

19 POTTER, ANDERSON & CORROON LLP

20 BY: BINDU A. PALAPURA, ESQ.

21 -and-

22
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24 Official Court Reporters
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1 P R O C E E D I N G S

2

09:56:32 3 (Proceedings commenced in the courtroom,
09:56:38 4 beginning at 9:30 a.m.)

09:30:48 5

09:30:48 6 THE COURT: All right. Good morning, everyone.

09:31:32 7 I assume based on everything that we're --

09:31:35 8 please be seated -- we're ready to go. Right?

09:31:38 9 MR. NYDEGGER: Yes, your Honor.

09:31:39 10 THE COURT: All right. And we actually have in

09:31:42 11 hand the jury instructions and the verdict form. Right?

09:31:44 12 All right.

09:31:45 13 Can I get a copy of the jury instructions and

09:31:48 14 the verdict form?

09:31:56 15 And, Ms. Palapura, did you personally check to

09:32:00 16 make sure that it was all good?

09:32:01 17 MS. PALAPURA: I did not, your Honor.

09:32:02 18 THE COURT: Okay.

09:32:04 19 MS. PALAPURA: I left it in good hands.

09:32:06 20 THE COURT: Okay. You have somebody you rely

09:32:08 21 upon who checked it?

09:32:09 22 MS. PALAPURA: Yes your Honor.

09:32:09 23 THE COURT: Okay. Good enough. Thank you.

09:32:11 24 All right. Let's get the jury.

09:32:39 25 (The jury entered the courtroom.)

09:33:43 1 THE COURT: All right. Good morning, members of
09:33:45 2 the jury. Everyone, you may be seated.

09:33:46 3 So as I said, I'm going to give you what's
09:33:52 4 called the jury charge now, and the first thing we're going
09:33:56 5 to do is hand you out copies of the jury instructions and
09:33:59 6 the verdict form.

09:34:31 7 All right. So, members of the jury, so I'm
09:34:48 8 going to read you the jury instructions, so you have a copy.
09:34:53 9 You can either read as I go along or you can listen, and
09:34:57 10 you'll have the written copy to look back at when you are in
09:35:00 11 the jury room. Whatever works best for you trying to absorb
09:35:05 12 what I'm about to cover. All right?

09:35:07 13 So now it is time for me to instruct you about
09:35:11 14 the law that you must follow in deciding this case.

09:35:13 15 I will start by explaining your duties and the
09:35:15 16 general rules that apply in every civil case.

09:35:17 17 Then I will explain some rules that you must use
09:35:19 18 in evaluating particular testimony and evidence.

09:35:22 19 Then I will explain the positions of the parties
09:35:26 20 and the law you will apply in this case.

09:35:28 21 And last, and I will do this after the closing
09:35:35 22 arguments, I will explain the rules that you must follow
09:35:38 23 during your deliberation in the jury room, and the possible
09:35:40 24 verdicts that you may return.

09:35:42 25 Please listen very carefully to everything I

09:35:44 1 say. In following my instructions, you must follow all of
09:35:46 2 them and not single out some and ignore others. They are
09:35:49 3 all important.

09:35:50 4 You will have your written copy of these
09:35:52 5 instructions with you in the jury room for your reference
09:35:54 6 during your deliberations. You will also have a verdict
09:35:56 7 form, which will list the questions that you must answer to
09:35:59 8 decide this case.

09:36:00 9 You have two main duties as jurors. The first
09:36:07 10 one is to decide what the facts are from the evidence that
09:36:09 11 you saw and heard here in court. Deciding what the facts
09:36:11 12 are is your job, not mine, and nothing that I have said or
09:36:14 13 done during this trial was meant to influence your decision
09:36:16 14 about the facts in any way.

09:36:18 15 Your second duty is to take the law that I give
09:36:21 16 you, apply it to the facts, and decide the issues presented
09:36:24 17 to you on the verdict form by applying the appropriate
09:36:27 18 burden of proof. It is my job to instruct you about the
09:36:29 19 law, and you are bound by the oath that you took at the
09:36:31 20 beginning of the trial to follow the instructions that I
09:36:34 21 give you, even if you personally disagree with them. This
09:36:36 22 includes the instructions that I gave you before and during
09:36:39 23 the trial, and these instructions. All the instructions
09:36:42 24 are important, and you should consider them together as a
09:36:44 25 whole.

1 Perform these duties fairly. Do not let
2 any bias, sympathy or prejudice that you may feel
3 toward one side or the other influence your decision
4 in any way.

5 In any legal action, facts must be proven by a
6 required standard of evidence, known as the burden of proof.
7 In this case, there are two different burdens of proof. The
8 first is called preponderance of the evidence. The second
9 is called clear and convincing evidence.

10 As I told you before and as you know, this is a
11 civil case in which Nox Medical is accusing Natus of patent
12 infringement. Natus and Nox have stipulated that the Natus
13 Pre-Sized Single Use RIP belt infringes claims 1, 5 and 9 of
14 the '532 patent.

15 Nox Medical asserts that Natus' infringement of
16 those claims is willful. However, Natus contends that it is
17 not liable for infringement because the '532 patent is
18 invalid and denies that it willfully infringed the '532
19 patent.

20 Natus has the burden of proving that each of
21 claims 1, 5 and 9 of the '532 patent is invalid by clear and
22 convincing evidence. Clear and convincing evidence is
23 evidence that produces an abiding conviction that the truth
24 of a factual contention is highly probable. Proof by clear
25 and convincing evidence is a higher burden than proof by a

preponderance of the evidence.

Nox Medical must prove its contention that Natus willfully infringed the '532 patent by a preponderance of the evidence. That means Nox Medical has to produce evidence which, when considered in light of all of the facts, leads you to believe that what Nox Medical claims is more likely true than not.

To put it differently, if you were to place Nox Medical's and Natus' evidence on the opposite sides of a scale, the evidence supporting Nox Medical's claims would have to make the scales tip somewhat to Nox Medical's side.

If you find that Natus has not met its burden to prove that all of the asserted claims of the '532 patent are invalid, then you will proceed to consider damages. Nox Medical must also prove its entitlement to damages and the amount of such damages by a preponderance of the evidence.

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, and the stipulations

1 that the lawyers agreed to.

2 Nothing else is evidence. The lawyers'
3 statements and arguments are not evidence. Their questions
4 and objections are not evidence. My legal rulings are not
5 evidence. My comments and questions are not evidence.

6 During the trial I may have not let you hear the
7 answers to some of the questions that the lawyers asked. I
8 also may have ruled that you could not see some of the
9 exhibits that the lawyers wanted you to see. And sometimes
10 I may have ordered you to disregard things that you saw or
11 heard, or I struck things from the record. You must
12 completely ignore all of these things. Do not even think
13 about them. Do not speculate about what a witness might
14 have said or what an exhibit might have shown.

15 These things are not evidence, and you are bound
16 by your oath not to let them influence your decision in any
17 way. Sometimes testimony and exhibits are received only for
18 a limited purpose. When I give an instruction regarding
19 that limited purpose, you must follow it.

20 Make your decision based only on the evidence,
21 as I have defined it here, and nothing else.

22 You should use your common sense in weighing the
23 evidence. Consider it light of your everyday experience
24 with people and events, and give it whatever weight you
25 believe it deserves.

1 If your experience tells you that certain
2 evidence reasonably leads to a conclusion, you are free to
3 reach that conclusion.

4 There are two kinds of evidence, direct and
5 circumstantial evidence.

6 Direct evidence is direct proof of a fact, such
7 as the testimony of an eyewitness. For example, if a
8 witness testified that she saw it raining outside, and you
9 believed her, that would be direct evidence that it was
10 raining.

11 Circumstantial evidence is indirect proof of a
12 fact, that is, proof of facts from which you may infer or
13 conclude that other facts exist. For example, if someone
14 walked into the courtroom wearing a raincoat covered with
15 drops of water and carrying a wet umbrella, that would be
16 circumstantial evidence from which you could conclude that
17 it was raining.

18 The law makes no distinction between the weight
19 that you should give to either direct or circumstantial
20 evidence, nor does it say that one type of evidence is any
21 better evidence than the other. You should consider all the
22 evidence, both direct and circumstantial, and give it
23 whatever weight you believe it deserves.

24 You are the sole judges of each witness'
25 credibility, or believability, and of the weight each

09:42:01 1 witness' testimony deserves. You should consider each
09:42:05 2 witness' means of knowledge, strength of memory, opportunity
09:42:10 3 to observe, how reasonable or unreasonable the testimony is,
09:42:13 4 whether it is consistent or inconsistent, whether it has
09:42:16 5 been contradicted, the witness' biases, prejudices, or
09:42:19 6 interests, including the witness' relation to either party
09:42:22 7 in the case and whether and how the witness might be
09:42:24 8 affected by the verdict, the witness' manner or demeanor
09:42:27 9 on the witness stand, and all circumstances that, according
09:42:29 10 to the evidence, could affect the credibility of the
09:42:32 11 testimony.

09:42:33 12 If you find the testimony to be contradictory,
09:42:35 13 you must try to reconcile it, if reasonably possible, so as
09:42:39 14 to make one harmonious story of it all. But if you cannot
09:42:44 15 do this, then it is your duty and privilege to believe the
09:42:49 16 portions of testimony that, in your judgment, are most
09:42:52 17 believable and disregard any testimony that, in your
09:42:54 18 judgment, is not believable.

09:42:57 19 In determining the weight to give to the
09:43:00 20 testimony of a witness, you should ask yourself whether
09:43:02 21 there was evidence tending to prove that the witness
09:43:04 22 testified falsely about some important fact, or, whether
09:43:07 23 there was evidence that at some other time the witness said
09:43:09 24 or did something, or failed to say or do something that was
09:43:13 25 different from the testimony he gave at the trial. You have

1 the right to distrust each witness' testimony in other
2 particulars and you may reject all or some of the testimony
3 of that witness or give it such credibility as you may think
4 it deserves.

5 You should remember that a simple mistake by a
6 witness does not necessarily mean that the witness was not
7 telling the truth. People may tend to forget some things or
8 remember other things inaccurately.

9 If a witness has made a misstatement, you must
10 consider whether it was simply an innocent lapse of memory
11 or an intentional falsehood, and that may depend upon
12 whether it concerns an important fact or an unimportant
13 detail.

14 This instruction applies to all witnesses,
15 including expert witnesses and witnesses that provided
16 testimony by deposition.

17 When knowledge of technical subject matter may
18 be helpful to the jury, a person who has special training or
19 experience in that technical field -- called an expert
20 witness -- is permitted to state his or her opinion on those
21 technical matters. However, you are not required to accept
22 that opinion. As with any other witness, it is up to you to
23 decide whether to rely upon it.

24 In weighing expert testimony, you must consider
25 the expert's qualifications, the reasons for the expert's

09:44:26 1 opinions, and the reliability of the information supporting
09:44:28 2 the expert's opinions, as well as the factors I have
09:44:30 3 previously mentioned for weighing testimony of any other
09:44:32 4 witness. Expert testimony should receive whatever weight
09:44:35 5 and credit you think appropriate, given all the other
09:44:37 6 evidence in the case. You are free to accept or reject the
09:44:40 7 testimony of experts, just as with any other witness.

09:44:42 8 During the course of the trial, you have seen
09:44:59 9 many exhibits. Many of these exhibits were admitted as
09:45:01 10 evidence. You will have these admitted exhibits in the jury
09:45:05 11 room for your deliberations. The other exhibits (including
09:45:08 12 charts and animations presented by attorneys and witnesses)
09:45:12 13 were offered to help illustrate the testimony of the various
09:45:15 14 witnesses. These illustrations, called demonstrative
09:45:27 15 exhibits, have not been admitted as evidence, are not
09:45:31 16 evidence, and should not be considered as evidence. Rather,
09:45:34 17 it is the underlying testimony of the witness that you heard
09:45:36 18 when you saw the demonstrative exhibits that is the evidence
09:45:39 19 in this case.

09:45:40 20 Before you can decide the issues in this case,
09:45:45 21 you will have to understand the patent claims. The patent
09:45:49 22 claims are the numbered paragraphs at the end of the patent.
09:45:51 23 The patent claims involved here are claims 1, 5 and 9 of the
09:45:55 24 '532 patent.

09:45:56 25 The claims are intended to define, in words,

1 the boundaries of the invention described and illustrated
2 in the patent. In patent law, the requirements of a claim
3 are often referred to as claim elements or claim
4 limitations.

5 In this case, the parties have stipulated that
6 the Natus pre-sized single use RIP belt infringes claims 1,
7 5 and 9 of the '532 patent. This means that each claim
8 element or claim limitation of those claims is found in the
9 Natus belt.

10 However, Natus contends that it is not liable
11 for infringement because claims 1, 5 and 9 of the '532
12 patent are invalid because they would have been obvious to
13 one skilled in the art of that patent, also referred to as a
14 person of ordinary skill in the art at the time of the
15 invention.

16 As I will instruct you later, one of the things
17 you must do in determining whether the asserted claims would
18 have been obvious to a person having ordinary skill in the
19 art is to compare the patent claims to the prior art. In
20 making this comparison, it is important to remember that the
21 relevant comparison is between the language of the claims
22 and the prior art.

23 There are two different types of claims in a
24 patent. The first type is called an independent claim. An
25 independent claim does not refer to any other claim of the

1 patent. An independent claim is read alone to determine its
2 scope.

3 In this case, claim 1 of the '532 patent is an
4 independent claim. You know this because it mentions no
5 other claim. Accordingly, the words of claim 1 are read by
6 themselves in order to determine what that claim covers. An
7 independent claim sets forth all of the requirements that
8 must be met in order for an accused system or method to be
9 covered by that claim.

10 The second way a claim can be stated is in the
11 form of a dependent claim. A dependent claim does not
12 itself recite all of the requirements of the claim but
13 refers to another claim or claims for some of its
14 requirements.

15 In this way, the claim depends from another
16 claim or claims. A dependent claim incorporates all of the
17 requirements of the claims to which it refers. The
18 dependent claim then adds its own additional requirements.
19 To determine what a dependent claim covers, it is necessary
20 to look at both the dependent claim and any other claims to
21 which it refers.

22 Claim 9 of the '532 patent is a dependent claim
23 that depends from claim 1. Accordingly, the words of claim
24 1 must be read together with the words of claim 9 in order
25 to determine what claim 9 covers. Claim 5 depends from

claim 4, which depends from claim 1. Accordingly, the words of claims 1 and 4 must be read together with the words of claim 5 in order to determine what claim 5 covers.

Before you decide whether claims 1, 5 and 9 of the '532 patent are invalid, you will have to understand the patent claims. It is my job as judge to provide to you the meaning of any claim language that must be interpreted. In this case, I have interpreted the following terms from claim 1 of the '532 patent.

Flexibility.

The receiving hole being configured to function as a female snap button fastener for receiving the fastening the frame to a protrusion of the male portion of the snap connector electrode.

Electrode belt and the belt connector.

A conductor of the electrode belt.

Elongated member.

The conductor passing through the receiving hole.

These definitions are set forth in JTX-1. You must accept the meaning I give you in JTX-1 and use them when you decide whether any claim is invalid. For terms that I have not defined, you should give them their ordinary meaning.

I will now summarize the issues that you must

1 decide and provide instructions to guide your deliberations.

2 You must decide the following main issues.

3 One, whether Natus has proven by clear and
4 convincing evidence that claims 1, 5 and 9 of the '532
5 patent are invalid.

6 If you find that all of the asserted claims of
7 the '532 patent are invalid, then your deliberations are
8 complete. However, if you find that any asserted claim is
9 not invalid, then you will proceed to decide the following
10 issues.

11 Two, whether Nox Medical has proven by a
12 preponderance of the evidence the amount of damages adequate
13 to compensate it for the infringement, which in no event is
14 less than a reasonable royalty.

15 Three, whether Nox Medical has proven by a
16 preponderance of the evidence that Natus' infringement was
17 willful.

18 Natus contends that the asserted claims are
19 invalid. Natus contends that the asserted claims would have
20 been obvious to one of ordinary skill in the art of the '532
21 patent at the time of the alleged invention. I will now
22 instruct you on the rules you must follow in deciding
23 whether or not Natus has proven invalidity.

24 To prove that any claim of the '532 patent is
25 invalid, Natus must persuade you by clear and convincing

09:51:25 1 evidence, i.e., you must be left with an abiding conviction
09:51:28 2 that the claim is invalid.

09:51:29 3 When a party challenging the validity of a
09:51:32 4 patent relies on prior art that was considered by the
09:51:34 5 Examiner, the PTO, during the prosecution of the application
09:51:36 6 which resulted in the issued patent, that party's ability to
09:51:40 7 satisfy its evidentiary burden may be more difficult.

09:51:42 8 When a party challenging the validity of a
09:51:44 9 patent presents evidence that was not considered by the PTO
09:51:46 10 Examiner during the prosecution of the application which
09:51:52 11 resulted in the issued patent, such new evidence may be
09:51:55 12 given more weight than evidence considered by the Examiner
09:51:57 13 and may make it easier to satisfy the parties' evidentiary
09:52:01 14 burden.

09:52:23 15 A claimed invention is invalid as obvious if it
09:52:27 16 would have been obvious to a person of ordinary skill in
09:52:30 17 the art of the claimed invention at the time the invention
09:52:33 18 was made. Obviousness may be shown by considering one or
09:52:37 19 more -- I'm sorry, one or more than one item of prior art.

09:52:45 20 In this case, Natus contends that claims 1, 5
09:52:59 21 and 9 of the '532 patent would have been obvious at the time
09:53:03 22 of the invention, based on one or more of the combinations,
09:53:14 23 as I will describe in a couple pages. The date of the
09:53:18 24 invention was June 2010.

09:53:19 25 The following factors must be evaluated in

09:53:21 1 determining whether Natus has established that the claimed
09:53:24 2 inventions would have been obvious to one of ordinary skill
09:53:26 3 in the art at the time of the invention.

09:53:27 4 One, the level of ordinary skill in the art at
09:53:36 5 the time the invention of the '532 patent was made.

09:53:38 6 Two, the scope and content of the prior art
09:53:41 7 relied upon by Natus.

09:53:42 8 Three, the difference or differences, if any,
09:53:44 9 between claims 1, 5 and 9 of the '532 patent and the prior
09:53:48 10 art.

09:53:48 11 And, four, additional considerations, if any,
09:53:51 12 that indicate that the invention was obvious or not obvious.

09:53:54 13 Each of these factors must be evaluated,
09:53:56 14 although they may be analyzed in any order, and must perform
09:53:59 15 a separate analysis for each of the claims.

09:54:01 16 I will now explain each of the four factors in
09:54:03 17 more detail.

09:54:04 18 The determination of whether a claimed invention
09:54:16 19 would have been obvious is based on the perspective of a
09:54:19 20 person of ordinary skill in the art to which the '532 patent
09:54:22 21 pertains.

09:54:23 22 The person of ordinary skill is presumed to be
09:54:26 23 aware of all of the relevant art in the field to which the
09:54:32 24 '532 patent pertains. The person of ordinary skill is also
09:54:35 25 a person of ordinary skill creativity that can use common

09:54:39 1 sense to solve problems.

09:54:39 2 Natus and Nox Medical have stipulated that the
09:54:44 3 field of the art of the '532 patent is medical devices and
09:54:49 4 that a person having ordinary skill in the art of the '532
09:54:52 5 patent would include:

09:54:53 6 An individual with at least a Master's degree in
09:54:57 7 mechanical engineering, biomedical engineering, electrical
09:55:00 8 engineering, or an equivalent field, or an individual with a
09:55:06 9 bachelor's degree in mechanical engineering, biomedical
09:55:09 10 engineering, electrical engineering, or an equivalent field,
09:55:13 11 and with approximately one year of relevant experience in
09:55:15 12 industry or academia.

09:55:17 13 For the purposes of deciding obviousness, the
09:55:25 14 parties have stipulated and agreed that the relevant prior
09:55:27 15 art includes the following items received into evidence.

09:55:29 16 The Nox Abdomen and Thorax Respiratory Effort
09:55:34 17 Belt, which has been referred to by the attorneys and the
09:55:37 18 witnesses as the Semi-Disposable RES Belt, The
09:55:40 19 Semi-Disposable Belt, or the RES Belt.

09:55:43 20 And U.S. Patent No. 8,251,736, issued to
09:55:53 21 McIntire and other inventors which I will refer to as
09:55:58 22 McIntire.

09:55:59 23 These references were not considered by the
09:56:02 24 Examiner for purposes of determining patentability of the
09:56:04 25 claimed invention.

1 You should analyze whether there are any
2 relevant differences between the prior art and the claimed
3 invention from the view of a person of ordinary skill in the
4 art at the time of the invention.

5 Your analysis must determine the impact, if any,
6 of such differences on the obviousness of the invention as a
7 whole, and not merely some portion of it. In making this
8 comparison, it is the asserted claims of the '532 patent,
9 not the commercial embodiment of the '532 patent, that you
10 must compare to the prior art.

11 In analyzing the relevance of the differences
12 between the claimed invention and the prior art, you do not
13 need to look for precise teaching in the prior art directed
14 to the subject matter of the claimed invention.

15 You may take into account the inferences and
16 creative steps that a person of ordinary skill in the art
17 would have employed in reviewing the prior art at the time
18 of the invention. However, to find that a combination of
19 prior art rendered the invention obvious, you must find that
20 combination provided a reasonable expectation of success.
21 For example, if the claimed invention combined elements
22 known in the prior art and the combination yielded results
23 that were predictable to a person of ordinary skill in
24 the art at the time of the invention, then this evidence
25 would make it more likely that the claim would have been

09:57:21 1 obvious.

09:57:21 2 If, on the other hand, the combination of known
09:57:23 3 elements yielded unexpected or unpredictable results, or if
09:57:27 4 the prior art teaches away from combining the known
09:57:29 5 elements, then this evidence would make it more likely that
09:57:32 6 the claim that successfully combined those elements was not
09:57:35 7 obvious.

09:57:35 8 Importantly, a claim is not proved obvious
09:57:38 9 merely by demonstrating that each of the elements was
09:57:41 10 independently known in the prior art. Most, if not all,
09:57:44 11 inventions rely on building blocks long since uncovered, and
09:57:48 12 claimed discoveries almost of necessity will likely be
09:57:50 13 combinations of what is already known. Therefore, you
09:57:52 14 should consider whether a reason existed at the time of the
09:58:05 15 invention that would have prompted a person of ordinary
09:58:07 16 skill in the art in the relevant field to combine the known
09:58:10 17 elements in the way the claimed invention does.

09:58:12 18 The reason could come from the prior art, the
09:58:19 19 background knowledge of one of ordinary skill in the art,
09:58:22 20 the nature of any problem or need to be addressed, market
09:58:25 21 demand, or common sense. You may also consider whether the
09:58:28 22 problem or need was known, the possible approaches to
09:58:36 23 solving the problem or addressing the need were known and
09:58:39 24 finite, and the solution was predictable through use of a
09:58:44 25 known option.

1 If you find that a reason existed at the time of
2 the invention to combine the elements of the prior art to
3 arrive at the claimed invention, and there would have been a
4 reasonable expectation of success for doing so, this
5 evidence would make it more likely that the claimed
6 invention was obvious.

7 You must undertake this analysis separately for
8 each claim that Natus contends would have been obvious to a
9 person of ordinary skill in the art at the time of the
10 invention.

11 Before deciding the issue of obviousness for
12 each claimed invention, you must also consider certain
13 factors, which may help to determine whether or not the
14 invention would have been obvious. No factor alone is
15 dispositive, and you must consider the obviousness or
16 nonobviousness of the invention as a whole. These factors
17 include:

18 One, were products covered by the claim
19 commercially successful due to the merits of the claimed
20 invention rather than due to advertising, promotion,
21 salesmanship, or features of the product other than those
22 found in the claim?

23 Two, was there long-felt need for a solution to
24 the problems facing the inventors, which was satisfied by
25 the claimed invention?

1 Three, did others try, but fail, to solve the
2 problem solved by the claimed invention?

3 Four, did others copy the claimed invention?

4 Five, did the claimed invention achieve
5 unexpectedly superior results over the closest prior art?

6 Answering any, or all, of these questions yes
7 may suggest that the claim was not obvious. These factors
8 are relevant only if there is a connection, or nexus,
9 between the factor and the invention covered by the patent
10 claims. If you find there is such a connection, or nexus,
11 then, unless Natus shows that the claimed invention is not a
12 reason for the existence of a factor, that factor should be
13 considered along with all the other evidence in the case in
14 determining whether Natus has proven that the claimed
15 invention would have been obvious.

16 The question of nonobviousness is simple to ask,
17 but difficult to answer. A person of ordinary skill in the
18 art is presumed to have knowledge of the relevant prior art
19 at the time of the invention of the '532 patent. If you
20 find the available prior art shows each of the elements of
21 the claims in suit, you must determine whether it would have
22 then been obvious to a person of ordinary skill in the art
23 to combine or coordinate these elements in the same manner
24 as the claims. The difficulty that attaches to all honest
25 attempts to answer this question can be attributed to the

1 strong temptation to rely on hindsight while undertaking
2 this evaluation. You must not use hindsight or the '532
3 patent as a guide through the prior art references,
4 combining the right references in the right way so as to
5 achieve the result of the claims of the '532 patent.

6 If, after considering all of the evidence and
7 the law as I stated it, you are convinced that all of the
8 asserted claims of the '532 patent are invalid, your verdict
9 should be for Natus and you needing no further in your
10 deliberations. On the other hand, if you find that any
11 asserted claim of the '532 patent is valid, you must then
12 consider what amount of damages to award to Nox Medical for
13 the infringement.

14 I will now instruct you about the measure of
15 damages. By instructing you on damages, I am not suggesting
16 which party should win this case, on any issue.

17 The damages you award must be adequate to
18 compensate Nox Medical for the infringement. They are not
19 meant to punish an infringer. Your damages award, if you
20 reach this issue, should put Nox Medical in approximately
21 the same financial position that it would have been in had
22 the infringement not occurred.

23 Nox Medical has the burden to establish the
24 amount of its damages by a preponderance of the evidence.

25 Nox Medical is entitled to all damages that can

1 be proven with reasonable certainty. On one hand,
2 reasonable certainty does not require proof of damages with
3 mathematical precision. Mere difficulty in ascertaining
4 damages is not fatal to Nox Medical. On the other hand,
5 Nox Medical is not entitled to speculative damages, that is,
6 you should not award any amount for loss, which, although
7 possible, is wholly remote or left to conjecture and/or
8 guess. You may base your evaluation of reasonable certainty
9 on opinion evidence. I will give more detailed instructions
10 regarding a reasonable royalty shortly.

11 The patent laws provide that the amount of
12 damages that Natus must pay Nox Medical for infringing the
13 '532 patent must be enough to compensate for the
14 infringement, but may not be less than a reasonable royalty
15 for the use of Nox Medical's invention.

16 A royalty is a payment made to a patentholder in
17 exchange for the right to make, use, or sell the claimed
18 invention. A reasonable royalty is the amount of royalty
19 payment that a patentholder and the infringer would have
20 agreed to in a hypothetical negotiation taking place at a
21 time just prior to when the infringement first began. In
22 considering this hypothetical negotiation, you should focus
23 on what the expectations of the patentholder and the
24 infringer would have been had they acted reasonably in their
25 negotiations and entered into an agreement at that time. In

1 determining this, you must assume that both parties believed
2 the patent was valid and infringed and the patentholder and
3 infringer were willing to enter into an agreement. The
4 reasonable royalty you determine must be a royalty that
5 would have resulted from the hypothetical negotiation, and
6 not simply a royalty either party would have preferred.

7 I will provide you shortly with a list of
8 factors that you may consider when determining what royalty
9 would have resulted from a hypothetical negotiation.
10 Evidence of events after infringement first began can be
11 considered in evaluating the reasonable royalty, but only to
12 the extent that the evidence of such later events aids in
13 assessing what royalty would have resulted from a
14 hypothetical negotiation just before the time of
15 infringement.

16 In determining the reasonable royalty, you
17 should consider all the facts known and available to the
18 parties at the time the infringement began. Some of the
19 kinds of factors that you may consider in making your
20 determination are:

21 One, the nature and scope of the license, as
22 exclusive or nonexclusive; or as restricted or none
23 restricted in terms of territory or with respect to whom the
24 manufactured product may be sold.

25 Two, the licensor's established policy and

1 marketing program to maintain his patent exclusivity by not
2 licensing others to use the invention or by granting
3 licenses under special conditions designed to preserve that
4 exclusivity.

5 Three, the commercial relationship between the
6 licensor and licensee, such as, whether they are competitors
7 in the same territory in the same line of business, or
8 whether they are inventors or promoters.

9 Four, the effect of selling the patented product
10 in promoting sales of other products of the license, the
11 existing value of the invention to the licensor as a
12 generator of sales of his non-patented items, and the extent
13 of such derivative sales.

14 Five, the duration of the patent and the term of
15 the license.

16 Six, the established profitability of the
17 product made under the patent, its commercial success, and
18 its current popularity.

19 Seven, the utility and advantages of the
20 patented product over the old modes or devices, if any, that
21 had been used for working out similar results.

22 Eight, the nature of the patented inventions,
23 the character of the commercial embodiment of it as owned
24 and produced by the licensor, and the benefit to those who
25 have used the invention.

1 Nine, the extent to which the infringer has made
2 use of the invention, and any evidence probative of the
3 value of that use.

4 Ten, the portion of the profit that should be
5 credited to the invention as distinguished from non-patented
6 elements, the manufacturing process, business risks, or
7 significant features or improvements aided by the infringer.

8 Eleven, the opinion testimony of qualified
9 experts.

10 Twelve, evidence concerning the availability and
11 cost of acceptable, non-infringing alternatives to the
12 patented product. An acceptable, noninfringing alternative
13 must have been an acceptable substitute for the claimed
14 invention that did not infringe the patent, and was
15 available as of the date the '532 patent issued, on June 16,
16 2015.

17 And, 13, the amount that a licensor such as Nox
18 Medical and a licensee such as Natus would have agreed upon
19 at the time the infringement began if both had been
20 reasonably and voluntarily trying to reach an agreement.
21 That, is the amount which a prudent licensee -- who desired,
22 as a business proposition, to obtain a license to
23 manufacture and sell a particular article embodying the
24 patented invention -- would have been willing to pay as a
25 royalty and yet be able to make a reasonable profit and

1 which amount would have been acceptable by a prudent
2 patentee who was willing to grant a license. To determine
3 this amount, you should consider any other economic factor
4 that a normally prudent businessperson would, under similar
5 circumstances, take into consideration in negotiating the
6 hypothetical license.

7 That is, you should take into account any other
8 factors that, in your mind, would have increased or
9 decreased the amount of a reasonable royalty that Natus
10 would have been willing to pay and Nox Medical would have
11 been willing to accept, acting as normally prudent
12 businesspeople.

13 No one factor is dispositive and you can and
14 should consider the evidence that has been presented to you
15 in this case on each of the factors to determine a
16 reasonable royalty, that is, the payment that would have
17 resulted from a negotiation between the patentholder and the
18 infringer taking place at a time just before the date when
19 the infringement began on June 16, 2015.

20 If you find that any asserted claim of the
21 '532 patent has not been proven invalid, then you must
22 also determine whether or not Natus' infringement was
23 willful.

24 To show that Natus' infringement was willful,
25 Nox Medical must prove by a preponderance of the evidence

1 that Natus knew of the '532 patent and intentionally
2 infringed it.

3 For example, you may consider whether Natus'
4 behavior was malicious, wanton, deliberate, consciously
5 wrongful, or in bad faith. However, you may not find that
6 Natus' infringement was willful merely because it knew about
7 the patent, without more. Furthermore, the fact that Natus
8 stipulated to infringement of the asserted claims of the
9 '532 patent is not the same as an admission that it
10 willfully infringed. It is simply an agreement that Natus'
11 product did infringe the '532 patent. In determining
12 whether Nox Medical has proven that Natus' infringement was
13 willful, you must consider all of the circumstances and
14 assess Natus' knowledge at the time the challenged conduct
15 occurred.

16 Knowledge of the asserted patent is a
17 prerequisite to willfulness. Willfulness is assessed at the
18 time of the challenged conduct, and defenses to liability
19 about which an infringer was not aware of until later are
20 irrelevant when assessing willfulness.

21 Nox Medical has put on evidence from which you
22 could conclude Natus copied Nox's patented product before
23 the '532 patent issued, and then, when it learned of the
24 patent, continued to make and sell its product. It is
25 perfectly lawful to copy unpatented products, and before the

1 date of issuance of the '532 patent, the Nox disposable belt
2 was not patented. Deliberate copying of the commercial
3 product of the patent owner before issuance of the patent,
4 however, can be evidence of willfulness to the extent it
5 demonstrates Natus' state of mind after the '532 patent
6 issued and after Natus became aware of it.

7 If you determine that any infringement was
8 willful, you may not allow that decision to affect the
9 amount of any damages award you gave for infringement.

10 All right. So, members of the jury, that's the
11 great bulk of the jury instructions. We're going to take a
12 five-minute break so you have a chance to refresh yourself
13 before we go into closing arguments.

14 I believe, because I've set time limits, that
15 plaintiff's closing argument will be less than 45 minutes.
16 We'll take a 15-minute break after that.

17 Defendant's closing argument will be less than
18 45 minutes also. And whatever time plaintiff didn't use,
19 they have a very brief opportunity to rebut. Then I will
20 give the last five pages of the jury instructions and then
21 you'll retire to deliberate.

22 All right? So right now, take a short break to
23 wake yourselves up.

24 (The jury was excused for a short recess.)

25 THE COURT: All right. So are there any

1 exceptions to the jury instruction as read so far as opposed
2 to the substantive objections that you were making on
3 Friday?

4 MR. NYDEGGER: No, your Honor.

5 MR. REYNOLDS: None, your Honor.

6 THE COURT: Okay. All right. We'll take a
7 five-minute break.

8 (Short recess taken.)

9 - - -

10 (Proceedings resumed after the short recess.)

11 THE COURT: All right. We are ready to go here?

12 MR. NYDEGGER: Yes.

13 THE COURT: All right. Let's get the jury.

14 Par.

15 MR. NYDEGGER: Your Honor, I do plan to reserve
16 about five minutes for rebuttal.

17 THE COURT: Okay.

18 MR. NYDEGGER: And I could have really used the
19 extra ten minutes.

20 THE COURT: I think the jury will thank you.

21 MR. NYDEGGER: That's probably true as well.

22 (The jury entered the courtroom.)

23 THE COURT: All right, members of the jury.
24 Welcome back. Everyone, you may be seated.

25 Mr. Nydegger?

1 MR. NYDEGGER: Thank you, Your Honor. May it
2 please the Court.

3 Well, we appreciate your time and attention
4 throughout this trial, and now today the case will be
5 submitted to you to make a decision. And you may be asking
6 yourself, well, what do I have to decide? What you have to
7 decide is on the jury verdict form, which you'll see up on
8 the screen now.

9 The first question that you have to decide is
10 the validity of the claims of the '532 patent, claims 1, 5
11 and 9. And for each claim, Natus made two arguments for
12 invalidity. The first is that the claim is invalid in view
13 of the Nox RES belt or RES belt.

14 The second is that each claim is invalid in view
15 of the Nox RES belt with supplemented by McIntire. So for
16 each claim, you have to decide whether either of those
17 arguments renders the claim invalid.

18 Now, if you find any claim to be valid, then you
19 move to the next portion of the verdict form, which I will
20 show you now. That's Question No. 2.

21 Question No. 2 is: What amount of damages
22 should be awarded to Nox Medical to compensate it for Natus'
23 infringement?

24 And then No. 3, you need to decide whether
25 Natus' infringement was willful.

1 So you may be asking yourself, well, how do I do
2 this? How do I make these decisions? It's not as hard or
3 as daunting as it might seem.

4 As the Court instructed, use your common sense.
5 It's your job to go through the evidence and decide what is
6 the evidence, what facts do the evidence support, and use
7 that to make a determination and throw out everything else.
8 Throw out what's fiction, what's not true. Throw out
9 outlandish theories that just fly in the face and mock
10 common sense. If you do that, then the facts and the
11 evidence will take you to the right decision.

12 So let's talk about validity first, because
13 that's where you'll be starting.

14 To find a claim invalid, Natus must have
15 presented evidence, clear and convincing evidence, that
16 produces an abiding conviction that the claim is invalid.
17 To do that, it has to show that each and every claim is
18 taught by the prior art and that also there was a reason to
19 combine those elements the way that the claim does. You
20 heard that in the jury instructions that Judge Andrews has
21 read this morning. Well, I've made a claim chart to sort of
22 help you organize and go through this.

23 Now, when you perform this exercise in your
24 deliberations, you'll have to go through each element of
25 each claim.

1 Here, I've put up a few elements, I've
2 summarized a few elements of claim 1 on the board for you,
3 because these are the elements that are most glaringly
4 absent in the prior art, and I just don't have time to go
5 through all of them.

6 Now, you'll see that the middle row in this
7 chart is a row that says RES plus PHOSITA. This is that
8 first combination, whether the RES belt viewed in light of
9 the knowledge of a person of skill in the art teaches these
10 claim elements.

11 The second or the second or last column there,
12 RES plus McIntire, that's the combination of the RES belt
13 plus teachings of McIntire, because there are some absences
14 in McIntire, there are some absences in the RES belt that
15 Natus tries to fill in with McIntire. And so we'll go
16 through them and we'll talk about each of these, and the
17 evidence will show you that each of these claim elements are
18 missing.

19 And, by the way, in order to find a claim
20 invalid, there must be "yesses" all the way down one of
21 those columns. If there is a single "no" in either of those
22 columns, then the claim is valid. And if claim 1 is valid,
23 claims 5 and 9 are also valid, because claims 5 and 9 each
24 depend from claim 1, as Judge Andrews explained just a
25 moment ago in the instructions.

1 So I'd like to start with the element that's the
2 third down, the conductor of the electrode. The conductor
3 of the electrode belt enters, passes through, and exits the
4 hole. Okay. So let's talk about that.

5 Now, this is an example of the patented belt,
6 and you can see that that conductor of the electrode, it
7 enters the hole, exits the hole, thereby passing through.
8 Okay. That meets the claim language.

9 All right. Well, let's go and look at some
10 testimony from Dr. Williams now about the prior art.

11 I asked Dr. Williams, what does the word hole
12 mean? And he says, you just give it your plain and ordinary
13 meaning. I'm not an engineer. Most of you aren't
14 engineers, but we can all understand this because it's just
15 a plain and ordinary meaning. And he said that the meaning
16 he used was an absence of material that is required to
17 receive the male snap.

18 Well, I thought that was a little curious,
19 required to receive the male snap. And so if you will
20 remember, I started to question Dr. Williams about what that
21 really meant. And I took this exhibit, this is PDX 42, and
22 I took this, and I said, Dr. Williams, if I put my hand like
23 this through the hole, does my hand exit the hole? And he
24 said, yeah, it does. I said, oh, I'm thinking, okay, that
25 makes sense.

1 What if I close my hand and this now represents
2 a male snap? Does my hand exit the hole now? He said, no,
3 it doesn't.

4 What? Ladies and gentlemen, that flies in the
5 face of common sense. How does my hand exit the hole
6 here, but it's a male snap and it doesn't exit the hole
7 here?

8 See, Dr. Williams is using some contrived,
9 contorted meaning of hole to try and make it fit the claim
10 language. That is not the plain and ordinary meaning.

11 And so I pursued this further with Dr. Williams.
12 Remember, I gave him this example. This is a representation
13 of the snap blown up so that we can see.

14 And I said, Dr. Williams, if I put this male
15 snap, this skinny male snap in the connector, does that
16 red wire pass through the hole? He said, no, it doesn't.
17 Okay. Well, what if I put my hand in there? He looked at
18 it and he said, yes. Now that wire passes through the hole.
19 It exits the hole.

20 It hasn't changed one bit. How does the hole
21 change sizes depending on the snap put inside? It doesn't.
22 It flies in the face of common sense. It's just not
23 credible. Either it passes through the hole based on the
24 structure of the hole itself, or it does not, and it does
25 not.

1 If we go and look at the RES belt, which is up
2 on the screen, you see that the spring wire, it lies behind
3 the hole in the front phase. It doesn't pass through that
4 at all.

5 Well, I also asked -- I also asked Mr. Oslan
6 about that. And you remember, Mr. Oslan, he made an example
7 where this represents the opening in the front face, that
8 hole, and these are the wires. And I asked Mr. Oslan, does
9 that pass through the hole, Mr. Oslan? And he said, no, it
10 doesn't. I think we would all agree.

11 Well, what happens if I put the dimple that's
12 located on the back of the conductor? If you put that
13 conductor up again, please, you see that there's a dimple on
14 the back side? So when you close it, this is what you get.
15 You have the opening and you have the dimple.

16 Well, do the wires pass through that now? No,
17 they don't. Why? Because the hole is defined by the
18 plastic. The wires pass through a space between the dimple
19 and the opening. Why is that space there? That space is
20 critical. As you heard Mr. Hoskuldsson testify, that space
21 is critical so that the wires can move back and forth when
22 the male snap goes through. So the wire does not pass
23 through the receiving hole.

24 So if we go back to our claim chart, we put a
25 big no, that that element is not found in the RES belt.

1 That right there is enough to show that the RES belt and
2 the PHOSITA do not invalidate claim 1. But wait, there's
3 more. Let's start at the column and work our ways down from
4 the top.

5 The plastic receiving hole must fasten to the
6 male electrode. Now, Dr. Williams conceded that the RES
7 belt doesn't do that. So what did he argue? He, in fact --
8 this is Mr. Reynolds asking him. He said, it's abundantly
9 clear that that hole doesn't fasten to the male snap? He
10 said, that's correct, it's abundantly clear.

11 So what did he argue? He said, well, a person
12 of skill in the art would take that hole and he would shrink
13 it down and make it smaller so that it did fasten to the
14 male snap.

15 Well, remember what the Judge told you about
16 making modifications or combinations. This is in your jury
17 instruction 4.5. Most, if not all inventions, rely on
18 building blocks that have been uncovered before. And so the
19 claims, most claim discoveries are new combinations of old
20 things. And then this last sentence. Therefore, you should
21 consider whether a reason existed at the time of the
22 invention to combine those teachings.

23 And so I asked Dr. Williams that very question.
24 Dr. Williams, what is the reason that would have motivated
25 a person of skill in the art to make that hole smaller?

1 And you remember this. Well, wait. Before we get there,
2 why do we need that reason? Let's go to the next jury
3 instruction.

4 Hindsight, obviousness. The reason that that
5 instruction, that you can't just put things together at
6 random, you have to have some reason for doing it, is to
7 avoid hindsight, because we've all seen an invention, and
8 after we've seen it, we've thought, I could have come up
9 with that. I could have been a millionaire. Well, yeah.
10 The answer to the problem is easy to see once you've seen
11 it, but that's using hindsight, and that's improper under
12 the law.

13 The person of skill in the art didn't have the
14 '532 patent to guide him or her, and so the reason that
15 there has to be some motivation or reason to combine the
16 elements is to guard against using hindsight, which is
17 improper.

18 So let's move on. We then have my question to
19 Dr. Williams. I said, Dr. Williams, what is the motivation,
20 what is the reason that would cause them to shrink that
21 hole? And he gave me two things. He said, you could make
22 it easier to manufacture and you could make it cheaper.
23 What?

24 So I asked him, because that didn't make sense
25 to me. I said, would making the hole smaller make it easier

1 to manufacture? At that point he caved and he said no. It
2 just flies in the face of common sense.

3 Would it make it less expensive to manufacture
4 by making that hole smaller? No, it wouldn't. He had to
5 concede, no, it wouldn't. He had no reason to do that.
6 There was no reason for a person of skill in the art to
7 make the hole smaller. There was no reason to combine.
8 And so consequently, we go back to the claim chart, and
9 we put a no there, because there was no reason to do what
10 Dr. Williams said should be done.

11 Let's go to the next one. The conductor at
12 least partially located in the electrode belt. This is
13 JTX-1, the Court's claim construction where he interpreted
14 certain phrase phrases, and the Court has said that the
15 electrode belt and the belt connector, which are plastic
16 parts, they are different parts.

17 And he said, the conductor of the electrode belt
18 is a conductor that is at least partially located in the
19 belt. Well, that makes sense. It's a conductor of the
20 belt, so it's partly in the belt.

21 Well, let's go and look at the analysis now.

22 Dr. Williams, he testified that the spring,
23 that's this part here, that the spring, curvy part, was
24 the conductor of the electrode belt that passes through
25 the hole and wraps around and does all the things it's

1 supposed to do. But I asked him, is any portion of the
2 spring in the belt? No, it's not. There's no portion of
3 the spring in that belt material part. And he had to agree
4 with that.

5 And so I continued and I said, well, now, the
6 spring wire, the spring wire is stiff, made of stiff metal,
7 because it has to perform the fastening function? He said,
8 that's right, it is.

9 And I said, the spring and the wire that
10 actually comes out of the belt, the conductor of the belt,
11 they're different parts with different material properties,
12 and they're just connected together. They are soldered
13 together? And he had to agree with that as well.

14 The spring is not the conductor of the electrode
15 belt. It's attached to the conductor of the electrode belt.
16 It's a different connector that is attached to it.

17 And so we go back to our claim chart and, once
18 again, we have another no. The conductor of the electrode
19 belt is not what passes through and wraps around as required
20 by the claims.

21 Next we have the conductor of the electrode belt
22 is wrapped around an engaging member so that the engaging
23 member forces it into the sides of the snap.

24 Well, what do we have on that front? When
25 explaining this, Dr. Williams, he had this picture up, and

1 he was explaining to Mr. Reynolds what that claim limitation
2 means. And he said, this is talking about when the male
3 snap is in the hole. You can see it right there. It's in
4 the hole. And the conductor is forced into physical contact
5 with that narrow net part of the snap. And he said, it
6 maintains that connection, so it doesn't just wobble away.
7 And that's what that claim limitation is talking about.

8 Well, then when he does his analysis, he does a
9 little sleight of hand and switches on us. If we look at
10 his testimony about the analysis, he says, well, to make
11 this make sense, the engaging member is contacting the wire
12 to keep it from just bending out and not coming back. Wait.
13 Bending out and not coming back? That's what springs do.
14 That's why it's a spring. It springs back after it is bent
15 out.

16 The engaging member doesn't force it back.
17 Further, and more importantly, remember, he said that the
18 claim limitation requires it to maintain the contact after
19 it's in the hole.

20 Well, you'll remember I did this demonstration
21 with Dr. Williams. I took the plastic engaging members
22 completely off and I took this spring and I snapped it on
23 the snap like so and I held that. And I said, Dr. Williams,
24 would you agree with me now it's the force of the spring
25 that maintains that contact? And he had to agree that it

1 does.

2 How could he not? There is no plastic on that.
3 It's not the plastic engaging member that forces the spring
4 into contact with the side of the electrode. It's the force
5 within the spring itself. That is why they use a spring.

6 And so we go back to our claim chart and, once
7 again, we add another no. We've got four of them now.

8 And last, we have the elongated member that
9 imparts flexibility to the hole. Well, Dr. Williams didn't
10 talk about this with the RES at all. He didn't talk, he
11 didn't show you elongated members on the RES. He didn't
12 show you any longitudinal axis or any of that that's
13 required by the claim language. He didn't talk about it at
14 all. So that's a definite no. So we have no's all the way
15 down the first column.

16 Well, remember, Dr. Williams then, he tried to
17 fill in some of those holes, saying that McIntire teaches
18 them. Well, let's look at that.

19 So we'll start at the top again. And before we
20 get there, go ahead. Go to that next slide.

21 So I asked him if there was anything that would
22 cause a person of skill in the art to combine features for
23 McIntire with other things? And remember he read some
24 portions of McIntire, and you're going to I think see those
25 again when Mr. Reynolds gets up.

1 And McIntire says, well, you could combine the
2 different features and components of McIntire in lots of
3 different ways, and you would do it to make it easier, to
4 manufacture and cheaper, and it said you could combine them
5 in different ways to do these things.

6 Well, remember, Mr., or Dr. Williams said that
7 McIntire teaches a semi-infinite number of combinations.
8 How many is semi-infinite? A million, ten million? I don't
9 know. A lot.

10 So a semi-indefinite number of combinations.
11 But remember, the law says there must be a reason to combine
12 them in the way the claim does.

13 And so I asked Dr. Williams that question:

14 Dr. Williams, what would cause a person of skill
15 in the art to combine it the way the claim does? Is it
16 because, is there anything in McIntire that says it would be
17 cheaper to combine these elements like the claim?

18 He said, No, McIntire doesn't give us any
19 direction there.

20 I said, is there anything in McIntire that says
21 that one special combination of the claim would be easier to
22 manufacture than all these semi-infinite number of
23 combinations?

24 Again, he didn't -- he said no.

25 I said, there's nothing that would suggest that?

1 And he said, you're right, there's not.

2 So there's, once again, no motivation, there's
3 no motivation to come to that one special combination of
4 claim 1.

5 And so if we go back to the chart in the top,
6 does McIntire teach a plastic hole that will fasten to the
7 snap? Yes, it does. We don't dispute that. It's taught.
8 But there's no reason to combine that with the RES belt.
9 And so, once again, that ends up being a no in that square.
10 It's present, but there's no reason to put it together with
11 the RES belt.

12 Well, the conductor at least partially located
13 in the electrode belt. Was there any reason -- sorry,
14 not a reason, but Dr. Williams, he testified that McIntire
15 doesn't teach that. He didn't say that McIntire fills that
16 hole at all. So that's not an RES belt and it's not in
17 McIntire.

18 And the same is for the next one down, the
19 conductor of the electrode belt passing through the hole.
20 He never told you that any conductor of any electrode belt
21 passed through any hole in McIntire. He concedes that it
22 does not. So that's a no.

23 The next one, the conductor wire wrapped around
24 the engaging member so that it's forced into the side. Does
25 McIntire teach that? You didn't hear one word from Dr.

1 Williams that said McIntire taught that. It's just not
2 there, and so that is a no.

3 And then, last, we have elongated member that
4 imparts flexibility. Well, these are located in the
5 McIntire, this is taught by the McIntire. It's taught in
6 Figure 12, and I think you'll see that a little later today
7 as well.

8 The question then becomes: Was there a reason
9 to combine that feature with the RES belt? And the answer
10 is no. Just like it was no for the plastic receiving hole,
11 he uses the same motivations and the same analysis that
12 applies for the elongated members. There's no reason to
13 combine them. He couldn't give one.

14 And so we have no's all the way down the first
15 claim and all the way down the second claim.

16 Remember, if there's even one in each column,
17 one no in each column, the claim is valid. And we've got at
18 least five. So the claim is invalid, but let's just assume
19 hypothetically that you found that each of the elements are
20 present, so you have yesses all the way down one or both of
21 these claims. What then?

22 Well, we go to jury instruction 4.6. These are
23 other considerations that you must consider before
24 determining whether the claim was obvious. These other
25 considerations, that's what happened in the real world.

1 This is no longer out there in make believe land or
2 hypothetical person of skill in the art. This is what
3 really happened. And as you see on the bottom, answering
4 any or all of these questions "yes" may suggest the claim
5 was not obvious. Well, let's go through them quickly.

6 Were the products covered by the claim
7 commercially successful due to the merits of the claimed
8 invention? Well, that is a "yes" answer. Mr. Hoskuldsson
9 explained. He went through claim 1 and he said, here is the
10 feature of claim one. Here it is in the Nox disposable
11 belt. And this is why it's commercially successful.
12 Because it wraps -- because that conductor wire from the
13 belt wraps around the hole, that gives us a great signal.
14 We have good signal stability. We have good signal quality.
15 Because we used that one plastic frame with the receiving
16 hole, it's easy to use. That makes it saleable. That makes
17 it commercially successful. It was so commercially
18 successful that Natus started copying and selling it as well
19 and all of that success was due to the claimed features, so
20 that's a yes.

21 Was there a long-felt need for a solution to the
22 problem facing the inventors, which was satisfied by the
23 claimed invention?

24 Well, you remember Nox Medical. They set out to
25 solve the problems of the cut-to-fit belts. Did they do

1 that? Yes, they did. They solved the ease of use problems.
2 They've solved the signal stability and quality problems.
3 And they did it by incorporating the claimed features into
4 the Nox disposable belt. So, yes.

5 How long had those problems been felt? Well,
6 remember, the cut-to-fit belts had been used since 2001.
7 We're now in 2009. At the time of the invention, almost a
8 decade, those problems had been felt and unsolved. The
9 answer to number two is yes.

10 Number three. Did others try to solve the
11 problem the claimed invention solved? Well, I can think of
12 four attempts and failures.

13 The first, interestingly enough, is Nox Medical.
14 Nox Medical, when they first started their company, they
15 tried to solve the problem of the cut-to-fit belt. Their
16 first product was the disposable belt, but that didn't solve
17 the problems. The problems were still there for signal
18 stability. They solved the ease-of-use problems but not the
19 others.

20 Well, that's one. So who else? Well, Natus.
21 They had every motivation to solve these problems. They
22 were getting complaints all over the place about their
23 cut-to-fit belts. They went to SASN. They couldn't do it.
24 Elas, they couldn't do it. All of them tried and failed.
25 So the answer to question number three is yes.

1 Number four, did others copy the claimed
2 invention? Well, we'll talk about that later, but
3 absolutely.

4 Mr. Murphy said, it's the Sinbon is the
5 knockoff, is the Nox knockoff. That's a copy, folks. The
6 answer to question number four is yes.

7 And, lastly, did the invention have unexpected
8 results? Well, you remember Mr. Hoskuldsson talked about
9 this as well. He testified that the signal quality that
10 they got out of this disposable belt was phenomenal,
11 exceeded everything they expected. In fact, the signal
12 quality is so good, that they are now collaborating with
13 universities like Harvard, because there's new information
14 that they couldn't get from the old belts, and they're now
15 researching that information so they can better diagnose
16 sleep disorders, better treat people, and help them have a
17 happier, healthier life. The answer to question number five
18 is yes.

19 So even they get yesses down both of those
20 columns, after considering all of these other
21 considerations, is it clear and convincing, you have an
22 abiding conviction that the claim was obvious?

23 Well, if that wasn't enough, what was the last
24 question I asked Dr. Williams? Remember, he said that this
25 technology is old as the hills. It has been around for

1 40 years or more. The invention is so easy, a sophomore in
2 college could do it.

3 I said, if this had been around so long and it
4 was so easy, has anybody done it? The answer was no. There
5 are only two people who have done it -- Nox Medical, who
6 invented it, and Natus, who copied. No one else. That is
7 the antithesis of obviousness.

8 So we've established now that the claims are
9 valid. Once we've done that, we go to the next phase, which
10 is damages.

11 And in damages, both parties presented an expert
12 witness and they both talked about a reasonable royalty.
13 And in doing that, they went through the 15 Georgia-Pacific
14 factors saying, this one has an up arrow, this one has a
15 down arrow, this one increased it, decreased it. At the end
16 of the day, they each came up with a royalty rate. \$1 for
17 Mr. Bero, \$2 for Mr. Cragun.

18 There were two significant differences between
19 they're analysis. Let's talk about the first one.

20 The first one has to do with a starting royalty
21 rate used by Mr. Bero. Mr. Bero used a starting royalty
22 rate of 65 cents. Okay? And he said that that is the
23 foundation of his analysis. And he said that it's the
24 starting royalty rate because that's where you start from,
25 and you build from that for the rest of the analysis. He

1 went through the factors.

2 He said, this factor is a positive so that makes
3 it go up and this one is a positive, too. He's going
4 through all the 15 factors. He says, this one, that's a
5 negative, so that would decrease it, and that's another
6 negative. And he went through one by 1 through 15 factors,
7 okay, stacking them up, showing his analysis. You get the
8 picture. At the end, where did he end up? He ends up at
9 the end of the day with a royalty rate of \$1.

10 So we have all the pluses and minuses all the
11 way up through all the Georgia-Pacific factors, and that's
12 what we get.

13 Well, let's go back to that starting rate,
14 because he said that it's important, it's important that you
15 get that starting number right, because if you don't get
16 that starting number right, that's the foundation, and that
17 affects the whole rest of the analysis.

18 Well, let's look at that starting rate for a
19 minute. How did we find 65 cents? He said, Natus has
20 stolen the belt sales from two of Nox Medical's customers,
21 and those belt sales to those two customers represent
22 15 percent of Natus' sales, so I take 15 percent, I times
23 that by Natus' gross profit, and I get 65 cents, and that's
24 what I've done.

25 But there's a problem there. Natus didn't sell,

1 or Nox Medical didn't just say to two customers in the U.S.
2 They sell to 650 customers in the U.S. And did Mr. Bero,
3 did he consider all of those 650 customers? We asked him:
4 How many of those 650 did Natus sell belts to taking sales
5 away from Nox Medical? He said, I can't tell you. I don't
6 know. Well, he had all of the customers of Nox Medical.

7 Did you ask Natus for their customer list so you
8 could do a cross-comparison and find out? He said, no, I
9 didn't do that. I expected Nox Medical to do that.

10 This is your theory, Doctor, or Mr. Bero. Why
11 would Nox Medical do your work? That doesn't make sense at
12 all.

13 So at the end of the day, Mr. Bero considered
14 two out of 650 customers, that missing 99 percent of Nox
15 Medical's customers. So he has no idea if this is right or
16 wrong. And what happened? You pull the foundation out, the
17 whole analysis comes crashing down. It can't stand because
18 the 65 cents is clearly wrong. He didn't even look at
19 99 percent of the customers out there to see if Natus had
20 stolen sales from Nox Medical. It just doesn't even pass
21 the straight face test. That's only one problem.

22 The second problem is that Mr. Bero, he said
23 that this is an open kimono negotiation. All the cards are
24 on the table, everything is face up. The parties know
25 everything and consider everything. Well, he said that, but

1 then he didn't do that in his analysis. He ignored all
2 sorts of evidence because it was bad for Natus. Let's look
3 at some of that evidence.

4 This is an e-mail where Ms. Quinlivan is
5 reporting that they're expecting a 4.4 million drop in their
6 XactTrace line in 2014. Their sales are dropping
7 4.4 million. He said this is due mostly because we lost
8 sales to Europe, to Nox, and because we have problems with
9 the reusable belts, but at the end there, the single, the
10 new single use belts, that's the knockoff, should help us
11 recover in the marketplace. Mr. Bero ignored that.

12 Let's go to the next one. Mr. Murphy, the
13 director of marketing. He is e-mailing his people. We know
14 the impact that these cut-to-fit belts are having on your
15 sales in general. It's not disputed.

16 Now, this is not just cut-to-fit -- it's not
17 just affecting their belt sales. It's affecting their
18 sales in general. This problem is contaminating other
19 products.

20 Let's go to the next one. Mr. Bero ignored
21 that.

22 Edmund Kotzur. He said Vivosol management is
23 one step away from terminating its relationship with Natus
24 and Embla. He said, it's so bad, we have to give away FOC
25 locks free of charge. We are giving locks away. The

1 cut-to-fit belt, we're giving it away free to keep people
2 from going to Nox.

3 Well, even then, not all customers will accept
4 that response. Some of them are still leaving, and he said
5 Vivosol expects action from Natus. Mr. Bero ignored that.

6 Let's go to the next one. This is Mr. Davies.
7 Mr. Davies. He said, well, I fear that if we don't replace
8 the previous lock design, that's the cut-to-fit design, our
9 customers will not switch back to Embla. They refer to use
10 the Nox belts they know to be reliable. Mr. Bero ignored
11 that all over the place.

12 Well, Mr. Bero, he said, I can ignore all of
13 that because that's all in Europe. This is a U.S. patent.
14 Remember, he talked about it. He said, this is a U.S.
15 patent. That's one of the three critical facts he focused
16 on. U.S. patent, U.S. sales.

17 Well, does that stand up to the evidence and the
18 facts? Let's look.

19 Next exhibit. This is an e-mail from Claude
20 Buckles. Who is he? The director of key accounts and
21 distribution in North America. We are no longer in Europe.
22 We're talking about North America here in the United States.
23 He says, I just had a frustrated key account. They have
24 more belts that are faulty. They're broken. They are not
25 working. It has gotten so bad, they have to track the

1 faults by putting tape on them to keep track of them. He
2 said the customer has told us, they will give us one last
3 try to rectify this issue. This is it. That's all they
4 will stand for. No more belts or supplies of any sort if
5 this fix doesn't work.

6 Once again, not just limited to Europe, not just
7 limited to belt sales. This was a big problem all over the
8 world. It was affecting all of their different products.
9 Mr. Bero, he ignored it. That is not open kimono
10 negotiation.

11 Why are all of these facts -- in fact, it's
12 interesting. Mr. Bero, he did not show you a single exhibit
13 in his whole presentation, not one. I don't know if you
14 noticed that or not. There wasn't a single citation to the
15 evidence.

16 The reason this is important is because these
17 are the facts that would drive a licensing negotiation.
18 Natus, they needed that product. They were giving their
19 belts away for free. And Mr. Bero, he says, well, Mr.
20 Cragun, he said, I considered all of this, and \$3 is what
21 Natus would have been willing to pay. That still left them
22 30 percent of their margin. It fixed all the problems. It
23 solved all their problems so it wouldn't contaminate the
24 other product lines where they have even higher margins,
25 and that's what Nox Medical would have accepted. That's

1 the profit they make selling Nox Medical. That's the profit
2 Nox Medical makes selling to CareFusion, its U.S.
3 distributor.

4 Well, what's wrong with having Natus pay the
5 same profit to Nox Medical that CareFusion pays? There's
6 nothing wrong with that. Natus can go out and make a
7 reasonable profit the same as CareFusion if they are paying
8 the same amount of its profit to Nox Medical. It just puts
9 CareFusion and Natus on an equal playing field. There's
10 nothing wrong or unreasonable about that.

11 So at the end of the day, the damages amount
12 that you should apply is \$3 per belt. You times that by the
13 number of belts and you come up with \$890,250. The number
14 of belts is not in dispute. It's just a matter of
15 multiplication. \$890,250. That is the reasonable royalty
16 rate.

17 Let's go to willfulness. That is the last issue
18 that you have to decide.

19 So back in 2012, Natus was hurting. We just
20 looked at the evidence. The facts are, Natus' belts were
21 causing it all kinds of grief. That problem had spilled
22 over into different products contaminating the reputation
23 of Natus. It was giving them heartburn like you can't
24 believe.

25 Well, in his opening statement, Mr. Reynolds --

1 I told you that Natus copied the product. Mr. Reynolds,
2 this is what he told you. He said, Natus didn't really
3 copy. He said, they asked a bunch of suppliers for a design
4 proposal. And Mr. Reynolds told you that the evidence would
5 show that they got a design proposal back from a Chinese
6 manufacturer that Natus later found out it was the same
7 because they happened to be the same manufacturer as Nox
8 Medical.

9 Well, let's look at the evidence. This is an
10 e-mail from Tom Duffy, the product manager of Natus' belts,
11 September 5th, 2012. A sample of the Nox design has been
12 shipped to Sinbon today. Once they receive it, they can
13 give us a better estimate on a schedule.

14 So who is telling the full story? What did they
15 get back? Well, let's look and see. On the left, you have
16 the Nox Medical belt that was shipped to Sinbon. On the
17 right, you have the product that comes back. The product is
18 called, unsurprisingly, the Nox knockoff. Natus absolutely
19 copied the product. Can there be any denial of that? Not a
20 credible one.

21 Well, let's go to some jury instructions. The
22 instructions in -- let's move on. Oh, well, okay. We'll
23 talk about this first.

24 So Mr. Murphy said, Natus said, we're not
25 willful because we did a patent search. We did a patent

11:00:11 1 search and we found there were no problems.

11:00:12 2 Mr. Murphy, he testified that this idea of
11:00:15 3 looking at a patent and doing a patent search was important,
11:00:17 4 and it was even heightened in this situation where the
11:00:20 5 products are so similar. And he said, I would want to know
11:00:23 6 about patent applications as well as patents. Right?

11:00:26 7 That's what he testified.

11:00:27 8 So let's move on. Next, he says, well -- we
11:00:38 9 said, well, okay. A few questions though. Where is the
11:00:42 10 search? Has Natus ever produced a search? They have not.
11:00:48 11 Not one document showing somebody has said, I did a search.
11:00:52 12 We're okay. I did a search. This is what I found. I did a
11:00:54 13 search. This is what I did not find. Not a shred of
11:00:59 14 evidence about the actual search, nothing.

11:01:02 15 Well, we tried to find out who did the search.
11:01:06 16 We asked Mr. Murphy. Mr. Murphy, did you perform this
11:01:10 17 search? He said, no, I did not. Well, did you talk to who
11:01:13 18 performed the search? He said, no, I did not.

11:01:17 19 Let's go back a slide. This is Mr. Duffy, the
11:01:19 20 product manager. We also asked him, Mr. Duffy, did you
11:01:23 21 perform the search? He said, I did not personally look into
11:01:26 22 that. It was someone else's responsibility.

11:01:30 23 Well, we have an e-mail from Mr. Nitin Shali.
11:01:35 24 He said, leave the patent stuff up to me. I will take care
11:01:38 25 of it.

1 We asked Mr. Duffy that question. Did
2 Mr. Shali, did he do the search? Mr. Murphy said, I don't
3 know who did it either. Who did the search? Natus has
4 never told us who did the search, what they found, what came
5 back or evidence. That evidence leads to one or two
6 conclusions. One, they never did the search, or, two, if
7 they did the search, they ignored it. That's it.

8 I mean, we know. We look at the face of the
9 patent, we know that there was information out there to
10 find.

11 Now, Natus has argued, and Mr. Reynolds in
12 his opening said, Nox Medical hid the patent. They hid
13 the applications. This was published in 2011. That is the
14 PCT. You cannot hide a published application. It's
15 published by the Government entity that the application was
16 filed with. It's impossible to hide. And 2011, that was
17 before Natus even started its project. This was long before
18 the 2012 September e-mail from Mr. Shali. It was not
19 hidden.

20 Further, in October of 2014, Nox Medical sent
21 them the U.S. published application. This was before they
22 launched in the U.S. And they said, look, we have a
23 published application. And this is in October of 2014. Nox
24 Medical didn't hide the applications. They couldn't. In
25 fact, it sent them to Natus, telling them, be warned.

1 Well, then we get to June 2015. The patent
2 issues. Here, we have a letter, the day the patent issues,
3 June 16th, 2015, telling Natus, our patent has issued. Your
4 products infringe. We demand you stop.

5 Now, Mr. Reynolds, he's going to say, all that
6 copying beforehand doesn't matter, but let's go to your jury
7 instructions, because your jury instructions tell you it
8 does. The willfulness is assessed at the time of the
9 alleged conduct, June 16th, 2015, and defenses to liability
10 that come up later are irrelevant. So the defenses that
11 Natus has put in this case, they are irrelevant to
12 willfulness, because they came up later.

13 Well, your instruction also tells you that
14 deliberate copying of the commercial product before issuance
15 can tell you about the state of mind of Natus after the
16 patent issued.

17 So let's talk about that. Natus knew it had
18 copied the product. What does that mean? When it got
19 that letter on June 15th, or June 16th, it knew it
20 infringed. It had copied the product. How could it believe
21 otherwise?

22 So that copying before tells you that after the
23 patent issued, they knew they infringed. What did they do?
24 They didn't have any idea, they didn't have any belief it
25 was invalid. They knew they infringed. They kept going on

1 with business as usual. They kept selling it. They kept
2 taking customers and sales away from Nox Medical.

3 You remember Mr. Bero, he said that they could
4 have easily avoided infringement for all of its
5 rest-of-world sales. They could have done it simply, is the
6 word he used, by just rerouting the shipping to their
7 warehouse in Ireland. After they got that letter, they
8 didn't even do that. They didn't respond to the letter.
9 They didn't reroute their shipping. That is willful
10 infringement.

11 They said, we're the multinational corporation
12 here. We're the big dog. We're going to crush Nox Medical.
13 We're not even going to respond. We dare them to come and
14 sue us. That is the message that they were projecting.
15 That is willfulness. It's bad faith. It's malicious.

16 You get to now decide this case. Thank you.

17 THE COURT: All right. So, members of the jury,
18 as I said, we'll take our morning break for 15 minutes. All
19 right? Then we'll come back and finish up here.

20 (The jury was excused for a short recess.)

21 THE COURT: All right. So we'll take our
22 morning break.

23 Mr. Nydegger, the clock says you have
24 three-and-a-half minutes of rebuttal. Okay?

25 MR. NYDEGGER: Three-and-a-half?

11:06:33 1 MR. LORIMER: Yes.

11:06:34 2 THE COURT: See you again in 15 minutes.

11:06:36 3 MR. NYDEGGER: Thank you, your Honor.

11:06:43 4 (Short recess taken.)

11:15:03 5 - - -

11:15:03 6 (Proceedings resumed after the short recess.)

11:23:29 7 THE COURT: All right. Are you ready to go?

11:23:32 8 MR. REYNOLDS: Yes.

11:23:32 9 THE COURT: All right. Let's get the jury.

11:23:56 10 (The jury entered the courtroom.)

11:24:40 11 THE COURT: All right. Members of the jury,
11:24:41 12 welcome back.

11:24:41 13 Everyone, you may be seated.

11:24:42 14 Mr. Reynolds?

11:24:44 15 MR. REYNOLDS: Thank you, your Honor.

11:24:45 16 Ladies and gentlemen, thank you for your service
11:24:48 17 here over this past week. Natus greatly appreciates the
11:24:53 18 time and attention you clearly have shown to the evidence
11:24:56 19 that has been presented to you.

11:24:58 20 We at Natus have done everything in our power to
11:25:01 21 try to give you as direct and straightforward a presentation
11:25:04 22 of the evidence as we could so that you would have the tools
11:25:09 23 when you go back into the jury room to answer the questions
11:25:11 24 your being asked in this case.

11:25:12 25 As the video in the beginning of this case

1 said -- let me take a step back. Natus has always believed
2 that this patent, the '532 patent on a plastic snap
3 connector for an electrode belt should not, could not have
4 been granted. We believe that it shouldn't have. But the
5 video in the beginning of this case said that it is you, the
6 jury, and only you who makes the decision about the validity
7 of the '532 patent.

8 Now, Nox, on the other hand, has done everything
9 during this trial to avoid the question of invalidity.
10 Mr. Nydegger in his closing talked about invalidity more
11 than their expert talked about invalidity during the trial,
12 during any of the witnesses that Nox presented testified
13 about the invalidity of a patent. That is because this
14 whole case for them has been a sideshow, a bag of tricks, to
15 try to distract you from the simple, straightforward
16 analysis that you are going to be asked to do when you enter
17 the jury room.

18 You cannot let that distract yourself from the
19 job your going to be doing here. As I told you at the
20 beginning of the week, a week ago, at the end of this case,
21 your going to be given a jury verdict form, a verdict form.
22 So we're at the end of the case -- and here it is. That's
23 the verdict form. Mr. Nydegger has also already shown you
24 it. It's up on the whiteboard.

25 There are three questions your going to be asked

1 to answer.

2 First, as we have stated, we believe the '532
3 patent is invalid, and I will get more into that in a
4 second. That's question one.

5 If you find the patent to be invalid, your job
6 is over. You don't get to questions 2 and 3 at all. If,
7 however, it's your decision and your decision alone, jury,
8 to decide whether the '532 patent is invalid, if you find it
9 valid, then and only then do you reach these questions 2 and
10 3 about damages and willfulness.

11 So, first, the invalidity of the '532 patent,
12 what this case has been all about.

13 Specifically, your being asked to decide whether
14 claims 1, 5 and 9 would have been obvious to a PHOSITA, a
15 person having ordinary skill in the art. Now, that is
16 agreed to be an engineer who has got some experience in the
17 medical device arena. Your being asked to decide whether
18 the '532 patent and claims 1, 5 and 9 would have been
19 obvious to such a person in light of the prior art, in light
20 of the RES belt alone, with their knowledge that they have
21 in their head as a person having ordinary skill in the art,
22 an engineer with some work experience, and then, secondly,
23 in combination with, or and the McIntire reference.

24 Dr. Williams in his testimony walked you through
25 every limitation of the claim chart. That's what we have in

1 front of you and I'm going to get to that in a second.

2 Mr. Nydegger even this morning -- what
3 Mr. Nydegger did, and you can look at the jury instructions
4 that the Court provided you, jury instruction 1.4 talks
5 about evidence. It says that evidence in this case includes
6 only what the witnesses said while they were testifying
7 under oath. That's what Dr. Williams did. The exhibits
8 that I allow into evidence and the stipulations that the
9 lawyers agree to. Nothing else is evidence. And this is
10 very important. The lawyers' statements and arguments are
11 not evidence.

12 Finally in this case, Mr. Nydegger tried to talk
13 about some claim language because Nox avoided that during
14 the entire case, but even then he actually didn't put up
15 exact wording from the claim. This is the claim.

16 So Dr. Williams told you that every word in
17 claim 1 is literally found in the prior art RES belt except
18 for the concept of the receiving hole flexibly being the
19 snap connector that attaches to the male electrode. If you
20 remember the RES belt -- and if we can put up PDX-18. Can
21 we blow that up at all?

22 This is the inside of the RES belt. By the way,
23 this is a Nox photograph. They took a high res photograph,
24 so to really point these features out, I wanted to use their
25 photograph.

1 Dr. Williams walked you through and said every
2 single element of this claim is found in the Nox RES belt
3 literally except for that the RES belt uses a spring clip to
4 attach to the male electrode, and the claimed invention, as
5 I will show you in a second, and we already talked with Dr.
6 Williams, it is the flexibility of the receiving hole that
7 does that job.

8 So let's go through what Dr. Williams said.

9 First of all, he said that the preamble is
10 pretty much just something to set the stage for what we are
11 talking about. We're not talking about cars or chemicals
12 here. We're talking about electrode belts and a belt
13 connector. We're clearly in the right field here, and
14 that's not a limitation, but just again sort of sets the
15 stage. It's called the preamble. But let's go to the claim
16 language.

17 First, it requires a molded plastic frame. Dr.
18 Williams testified. Again, evidence, testimony, not some
19 argument by a lawyer at the end of the case that that is a
20 molded plastic frame. There's indicia of molding by the
21 marks and so forth. There can be no dispute that's a molded
22 plastic frame.

23 Then he said, that molded plastic frame includes
24 a receiving hole, the receiving hole being configured to
25 function as a female snap button fastener. Okay.

1 The RES belt includes a receiving hole. If you
2 will go to Williams number 3, that photograph.

3 If you remember this picture that Dr. Williams
4 talked about, the hole that receives the male electrode is
5 the receiving hole. All this magic with putting your hand
6 through a hole and just the opening of it, Dr. Williams said
7 it's because I can't tell, you know, that's not a real world
8 example.

9 Where the receiving hole is, it isn't defined.
10 It is absolutely clearly defined in the prior RES belt.
11 It's that hole that receives the mail electrode snap. The
12 receiving hole being configured to function as a female
13 snap button fastener. There's no question that the RES belt
14 functions as a female snap button fastener. It attaches to
15 the male electrode. That's what it does.

16 Then it says, for receiving. Again, there can
17 be no question that that receives the male snap, and
18 fastening. We're going to leave that to the side for a
19 second because that's the difference in claim 1. The radial
20 flexibility of doing the fastening that is different from
21 what is in the RES belt. But it says, for receiving and
22 fastening the frame to a protrusion of the male portion of
23 the snap connector electrode.

24 Ladies and gentlemen, that simply is a female
25 snap button fastener, but has language, and I'm going to

1 even circle it to be sure we're giving you this as straight
2 as we can. Radial flexibility does the fastening. I will
3 get to that in a second. All of those other words are
4 clearly found in the prior art RES belt.

5 Then Dr. Williams went to the next limitation.
6 A fastener configured to fasten the frame to a first end of
7 the electrode belt. If we can go back to the PDX-18.

8 If you remember, we talked about these little
9 teeth that are very hard to see in this picture, but there's
10 no dispute about this. Those little teeth on the bottom,
11 when you sandwich the RES belt connector to the belt, they
12 fasten the belt to the buckle. No are question about this
13 element. It is found in the prior art RES belt.

14 Next is this engaging member. Now, this is very
15 telling because, again, this is Nox's photograph. If we can
16 blow that up.

17 There is no question that these engaging members
18 that are on the sides of the hole or adjacent to the
19 receiving hole, it says, it gives you structure about those
20 engaging members, and then it has a such that language,
21 which is a clause that I will read, that tells you the
22 function that that structure has to perform.

23 So, first of all, it flat-out says, an engaging
24 member adjacent to said receiving hole. There are these
25 two engaging members adjacent to the receiving hole. The

1 engaging member engaging the conductor of the electrode
2 belt. Okay.

3 Now, this is Nox's photograph, and the reason I
4 find it so telling is you can see with the snap in, those
5 engaging members are pushing on the spring to keep it in
6 place, keep it aligned. This magic show of showing things
7 in thin air is irrelevant. This is the way it actually
8 works.

9 Now, in addition to that, if we can go to
10 Williams No. 4. To remove any doubt about this, the
11 conductor is of the belt. When you remove the belt from the
12 buckle, the conductor is right there. I mean, yes, it's
13 soldered to the part of the conductor that is in the,
14 woven into the belt material, but that's all the
15 conductor -- there's no question that that is a conductor of
16 the belt, and that's what this language says, conductor of
17 the belt.

18 As we said, the engaging member is adjacent to
19 the receiving hole, the engaging member engaging the
20 conductor of the electrode belt. Now back to Williams 3.

21 By the way, you may have remembered, too, that
22 that is our photograph, but Mr. Nydegger, when he approached
23 Dr. Williams on the stand, he brought -- he took the belt
24 out of the buckle, and when he brought the belt up there, it
25 had the conductor with it. He was trying to deal with

1 another issue at the time, but the conductor is of the belt.

2 The next language, it says, by the conductor
3 passing through the receiving hole. Okay.

4 Ladies and gentlemen, if you look at the male
5 electrode in the receiving hole, and then on the left we
6 have it removed so you can see cut away, you can see that
7 whole hole, there is no question that the conductor passes
8 through the receiving hole.

9 Look, how could it not? The thing wouldn't
10 function if the conductor didn't pass through the receiving
11 hole. It has to make electrical contact with the male
12 electrode.

13 The conductor passes through the receiving hole
14 while being wrapped around the engaging member, and that --
15 back to Williams, I'm sorry, PDX-18.

16 PDX-18 shows you that they wrap them around
17 those engaging members so that they can engage and push the
18 spring clip, the conductor into contact with the male
19 electrode. So the such that language says, we've got the
20 structure in the prior art RES belt.

21 Now let's just talk about what that structure is
22 supposed to do. The claim tells us, it specifically says,
23 such that when the male portion of the snap connector
24 penetrates the receiving hole, which is shown down here, the
25 conductor is forced into physical contact with at least a

1 lateral surface of the male portion of the snap connector
2 electrode. There's no magic here, ladies and gentlemen.
3 That simply is what has to happen.

4 So if we can go back to Williams number three.
5 When you put the male electrode in, it has to contact that
6 electrode. That electrode is held in place by the engaging
7 members that hold it in place, position it so that it stays
8 in contact with the male electrode. That's what Dr.
9 Williams said this language means and that's what Dr.
10 Williams says this language covers.

11 So what we're left with is, Dr. Williams said,
12 all of this language in claim 1 that I've crossed out is
13 literally found in the prior art RES belt. That's evidence.
14 That's Dr. Williams saying that.

15 He said, however, though, it doesn't
16 specifically, it doesn't literally show radial flexibility
17 of the hole. He did say that you may have heard him say the
18 hole of the RES belt is radially flexible because it's made
19 out of plastic, and plastic inherently has some radial
20 flexibility. But it is not the radial flexibility in the
21 RES belt that does the fastening. It's that spring clip.

22 So he says radial flexibility doing the
23 fastening by the specific structure, and I'm going to
24 get to that in a second. He said, it's not literally shown
25 in the RES belt, but one of ordinary skill in the art, an

1 engineer with some experience in the medical device industry
2 would readily know that you could substitute, you could
3 replace a metal spring clip fastener for a flexible plastic
4 snap fastener. That's what engineers do, ladies and
5 gentlemen. They look at things that are in the prior art.
6 They design. They take cost out of things. They jigger
7 things around.

8 This idea of infinite possibilities that
9 Mr. Nydegger keeping talking about, that's because, yes, you
10 could slightly change the whole size. You could change the
11 color. You could slightly choose a different material and
12 suddenly you have a lot of different possibilities for doing
13 this, but at the end of the day, you are not going to end up
14 with a Ferrari. Your still talking about an electrode
15 connector. That's what this is.

16 Now, as I said, Dr. Williams specifically said
17 that one of ordinary skill in the art looking at the RES
18 belt alone would say, okay. The RES belt basically
19 discloses everything of claim 1. And what's missing, this
20 idea of using the flexibility to just do the snapping
21 function instead of a spring clip, Dr. Williams said, I
22 think that that would be readily known to one of ordinary
23 skill in the art. However, to remove any doubt about it, we
24 have McIntire. So let's throw up the McIntire patent, page
25 12 and 13.

1 Figs 12 and 13 clearly say that prior art prior
2 to this invention of claim 1, that it was well-known that
3 you had flexible plastic spring clips. Now, Dr. Williams
4 said that flexible plastic spring clips would be well-known
5 to one of ordinary skill in the art, an engineer with
6 experience. He said that would even be something,
7 especially when you are looking at McIntire, that one of his
8 software design students would find obvious.

9 I would hazard a guess that if any of you on the
10 jury is even reasonably mechanically or electrically
11 inclined, that you would look at McIntire and say, you know,
12 that's obvious that I could use the teachings of it and come
13 up with a plastic snap connector version of what claim 1
14 says.

15 So let's talk about that. Radial flexibility
16 doing the fastening. There is no question, and Dr. Williams
17 testified, that that is what is shown here. Two different
18 versions of it. And in Figure 12, it happens to be that it
19 shows the exact structure that is in the wherein clause.
20 You have to have radial flexibility to do the fastening
21 according to the literal language of the claim, but then the
22 wherein clause tells you, I'm going to specifically narrow
23 down this to say it has to be this structure.

24 And let's read what it says and what Dr.
25 Williams said it says. Wherein radial flexibility of the

1 receiving hole is achieved by one or more slots, and if you
2 look here, we've got these two slots extending from the
3 hole. That's what the beginning of the claim says, and,
4 frankly, as Dr. Williams said, that would be readily
5 understood by one of ordinary skill in the art even without
6 McIntire, because you know you can put little slots on a
7 hole to impart radial flexibility.

8 If you've ever had a jacket with a snap or a
9 Western shirt or something like that, they often have two
10 little spring clips in there, or there is another
11 alternative where even with a metal snap, they just rely on
12 the radial flexibility by cutting little slots in the
13 perimeter. So where radial flexibility of said receiving
14 hole is achieved by one or more slots extending from said
15 hole. Clearly shown in Figure 12 as I just pointed out.

16 And wherein the receiving hole and one or more
17 slots are formed by at least one elongated member having
18 flexibility transverse to the longitudinal axis. These
19 elongated members on the side of the hole form the hole and
20 they act like a diving board, I think is what Dr. Williams
21 said was his example of why a long thin member always has
22 some transverse flexibility.

23 Again, McIntire specifically said exactly what
24 this claims. Now, you may also remember that Mr.
25 Hoskuldsson, when he testified in this case, said, I don't

1 think that anything in the prior art ever showed transverse
2 flexibility. He was saying that that idea of just springing
3 out and back was not something he knew to be in the prior
4 art.

5 There it is. If you force a male snap into that
6 hole, your going to get these two beams, these two elongated
7 members to Flex, you know, lateral or radial to the hole,
8 transverse outward from the hole.

9 Now, I would like to put up some language from
10 McIntire. Before I do that, let's just stay where we are
11 for a second.

12 Dr. Williams basically said that all of the
13 words of claim 1 are found in the RES belt except that one
14 function we just talked about. He said that would be
15 obvious to one of ordinary skill in the art. So he said
16 that claim 1 in his opinion would be obvious even without
17 the McIntire reference, but to remove any doubt, we look at
18 McIntire and it has even the exact details of some of this
19 other language.

20 And you'll see in the jury instructions, you
21 don't have to have a slavish adherence to this language. It
22 has to be generally found in the prior art. And, and then I
23 will go into McIntire, the language.

24 Mr. Nydegger complained that there was nowhere
25 that anybody in the world would ever look to say, I know I

1 can combine the teachings of McIntire with the RES belt.
2 Well, here it is in black and white. The whole yellow
3 highlighted area was what Dr. Williams talked about. It
4 talks about all sorts of things that engineers do. That
5 they try to take cost out of things, they try to make them
6 easier to use, they look at the prior art. They try to
7 figure out, you know, what would be another variation.
8 Again, they are not remaking the product. They are not
9 remaking it all of a sudden, the next thing you know, you
10 have an EEG machine.

11 They are talking about, can you make minor
12 design variations? That is what engineers do. The
13 embodiments thus described in McIntire provide an electrical
14 lead that may be less costly and/or more easily
15 manufactured, assembled, and/or connected to an electrode
16 than at least some known electrical leads.

17 They're even telling you in McIntire that these
18 kinds of things that Mr. Nydegger was harping on about
19 easier to manufacture, assemble, connected to other kinds of
20 electrical leads, McIntire says, use the patent. Use this
21 female flexible snap connector in exactly the way we're
22 doing here with the RES belt.

23 Secondly, it says, rather, the embodiments
24 described and illustrated herein may be used with any system
25 for measuring any physiologic information.

1 Again, Mr. Nydegger harped on this limitless
2 number of possibilities. Sure, you can change minor little
3 things like the type of material or the size of the hole
4 minorly and you'll get a lot of different possibilities, but
5 this is specifically saying here, ladies and gentlemen, that
6 within the medical device arena, within the physiological
7 device kind of a space, which is exactly what we're talking
8 about with the RES belt, you would use McIntire, it would
9 teach an engineer that you can use the teachings to modify,
10 modify the RES belt.

11 Now, it is worth noting here or re-noting
12 actually that Nox spent so much time on the sideshow, that
13 they paid almost zero attention to this claim language.
14 Their expert, Mr. Oslan, was thrown up there at the end for
15 12 minutes and taken down. He didn't do any specific
16 analysis of the claim. It was -- they relied almost
17 entirely on Mr. Nydegger basically arguing his point in
18 closing.

19 And that's partly because Mr. Oslan, who is not
20 here today, but Mr. Oslan admitted that he really does not
21 have any experience in the design of electrode belts. So I
22 think they put him up there, had him answer a few questions,
23 and then got him down within 12 minutes.

24 And it should be noted that Mr. Herrmansson, he
25 is sort of the, where is Mr. Herrmansson character in this

1 case? Mr. Herrmansson is the inventor of the '532 patent.
2 They told you that he still does consulting work for Nox and
3 he didn't even show up at trial. He's the inventor of this
4 thing.

5 MR. NYDEGGER: Objection, your Honor. He's
6 pointing to an empty chair.

7 THE COURT: All right. Overruled.

8 MR. REYNOLDS: Now --

9 THE COURT: And actually, let me just think
10 about that.

11 So, members of the jury, one thing you have to
12 understand is, I do give the parties, you may not believe
13 this, but I actually give them time limits as to how long
14 they have to present their case. That's the reason why on
15 Monday morning last week I was able to tell you we'll be
16 finished the evidence by the end of Wednesday, because I
17 basically told them that's how long you can have.

18 So when you talk about witnesses who are here or
19 not here, you have to judge in light of the facts that there
20 is a limited amount of time, and so one of the instructions
21 that I sometimes give, but I didn't give because I didn't
22 think it was necessary here, was that it's not the number of
23 witnesses you call, who calls more witnesses or less.
24 That's not what is important. What is important is what the
25 witnesses who are here, what they say.

1 All right. Go ahead, Mr. Reynolds.

2 MR. REYNOLDS: Thank you, your Honor.

3 Yes. My point, jury, is, ladies and gentlemen
4 of the jury, is, simply that Mr. Oslan was up there for
5 12 minutes. Mr. Herrmansson didn't rise to the level of
6 importance to be at the trial. And neither one of them was
7 mentioned a single time -- I'm sorry. Mr. Oslan was
8 mentioned once by Mr. Nydegger in his closing. One time
9 they mentioned their expert, who has been working with them
10 for almost three years now analyzing these claims. One time
11 in the closing was Mr. Oslan mentioned, and never was
12 Mr. Herrmansson mentioned.

13 So Natus asks that you find claim 1 would have
14 been obvious in light of the RES belt alone and in light of
15 the semi-disposable RES belt and McIntire together. That's
16 what we believe the testimony shows. We believe the
17 testimony of Dr. Williams is largely unrefuted.

18 Now, if you find claim 1 invalid, you must find
19 claims 5 and 9 invalid, because, ladies and gentlemen, these
20 are basically throwaway claims. There's no dispute that the
21 electrode belt and belt connector of claim 4, which
22 basically says you can have a cover enclosing it, there's no
23 question McIntire shows it, there's no question that putting
24 a sticker on this thing would not save the validity of the
25 patent.

1 There was no testimony from Dr. -- I literally
2 think that Nox in its case never mentioned claim 5 anywhere
3 during this case. Mr. Oslan didn't try to defend it. There
4 was no testimony that would save the claim based on that
5 limitation of putting a sticker, fabric sticker or plastic
6 sticker, whatever it may be.

7 Claim 9, claim 9 has the additional limitation
8 that the belt is a textile belt with a wire woven into it.
9 This is the prior art RES belt. No question that it is a
10 textile belt with a wire woven into it. Again, a limitation
11 in claim 9 that was never mentioned by Nox in this trial.
12 Didn't even touch on these. These were a distraction to
13 make Natus defend itself against more invalid claims.

14 You also might remember there was a whole roll
15 of this material bouncing around during the trial that
16 precedes even the RES belt. That idea of a flexible textile
17 belt that has a wire woven into it is well-known.

18 So we ask that for the same reasons, that you
19 find claims 5 and 9 invalid as obvious both in view of the
20 RES belt alone and as invalid, invalid as obvious in view of
21 the RES belt plus McIntire.

22 Now, Mr. Nydegger in his closing, they didn't
23 talk about this during the trial very much, but in
24 instruction 4.6, he talked about the secondary
25 considerations you can look at to decide whether your going

1 to uphold the validity of the claim. And I will caution
2 you, when you read through those, it has to tie, there has
3 to be a nexus between some other consideration that's out
4 there in the ether and the claim elements. There's nothing
5 about this female snap connector that relates to those
6 secondary considerations.

7 Now, as I mentioned, if you answer that claims
8 1, 5 and 9 are invalid, you don't ever get to questions 2
9 and 3, but, again, it's for you, the jury, and only you to
10 make that decision. It's not our decision.

11 So if you find them valid, then you have to
12 answer questions 2 and 3. And I will hit the willfulness
13 question first, which is number 3.

14 You will recall that in this case, Mr. Nydegger
15 put a timeline up in the beginning of the case and he
16 referenced it again in his closing. And there was not a
17 single thing on there, and I pointed this out in the
18 beginning and it never came out in this case, there is not a
19 single thing that was on that timeline that is after the
20 issue date of the patent. It was all about activities prior
21 to the issuance of the patent, and everything in this trial
22 was about activities prior to the issuance of the patent.

23 I don't know if you can really appreciate how
24 rare that is. Patent cases usually start with, I have my
25 U.S. patent and now let's see what the defendant did after

11:51:25 1 that fact.

11:51:25 2 In addition to it all being activity before the
11:51:32 3 issuance of the patent, you also probably noticed, and
11:51:34 4 actually Mr. Nydegger kind of confirmed it, that a lot of
11:51:37 5 that activity, not all of it, but almost all of that
11:51:40 6 activity that is before the issue date of the patent
11:51:43 7 occurred in either France or China.

11:51:45 8 So U.S. patent liability cannot be founded on
11:51:49 9 activities outside of the United States regardless of when
11:51:53 10 they happened, but as I said, all of this stuff is before
11:51:55 11 the patent issued, and I've said this in the beginning, I
11:51:58 12 will say it again. You cannot infringe a patent before it
11:52:02 13 issues. The Court instructed you in that regard and you'll
11:52:06 14 see that in your instructions when you take them back. You
11:52:10 15 cannot infringe a patent before it issues. You cannot
11:52:13 16 infringe a pending patent or a patent pending. You cannot
11:52:16 17 infringe an invalid patent. You certainly can't willfully
11:52:20 18 infringe because of those same reasons.

11:52:23 19 Now, when Natus began sourcing its product from
11:52:26 20 its Chinese supplier, it was a year-and-a-half before the
11:52:29 21 '532 patent issued. Natus never imagined that a patent
11:52:33 22 could or should issue on a female plastic snap connector,
11:52:36 23 but what it did in June of 2015, when that patent issued,
11:52:41 24 Nox very quickly sued Natus and from that day, and actually
11:52:45 25 in Europe, even before that, Natus said, this is a bad

1 patent. This is a patent that should never have issued,
2 because the most important prior art, the RES belt and the
3 McIntire patent, were not provided to the Patent Office.
4 And as the Court instructed you, Sections 4. -- Section 4.4
5 says specifically that. RES belt and McIntire are prior
6 art, but were not in front of the Examiner, and instruction
7 4.1 says, therefore, you can give that kind of prior art
8 more weight.

9 Now, one other little thing that Mr. Nydegger
10 put up was this whole e-mail chain with Mr. Duffy, and you
11 probably heard Mr. Duffy testify by deposition in this case.
12 And it's important to read the entire e-mail, which says
13 that Mr. Duffy, after the Chinese suppliers are already in
14 the mix, they already responded to a request for a proposal,
15 we put our request for proposal to multiple vendors. You
16 heard that. One of them was a Chinese vendor.

17 After they are already working on that project,
18 then looking at competitive products, Nox's belt gets sent
19 to the Chinese supplier and says specifically, make a belt
20 not like this, this one, because he was just sending other
21 competitors' products.

22 He says, make a belt like Natus' reusable belt,
23 but we want to make a disposable version of it. Here are
24 some disposable belts, other competitors' belts to take a
25 look at. And all of that came after Natus was already

11:54:25 1 engaged with suppliers, working on designs.

11:54:28 2 Now, again, question 3, we ask that you find
11:54:33 3 that, no, there was no willful infringement, and the verdict
11:54:38 4 form flips back and forth a little bit. The left side on
11:54:41 5 question 1 is Natus, but then on question 3, the right
11:54:44 6 side is for Natus and we ask that you don't even get to
11:54:47 7 that question because of the invalidity one, but if you
11:54:49 8 do get to it, we ask you find that there was no willful
11:54:52 9 infringement.

11:54:52 10 Now, lastly is damages. If we could put up
11:55:01 11 slide 1 from the damages presentation.

11:55:10 12 Again, this is the -- the threshold question is
11:55:13 13 invalidity, but if you find the patent is valid, you have to
11:55:17 14 find what amount of damages Nox would be entitled to.

11:55:20 15 As the Court instructed you, it is Nox's burden,
11:55:23 16 they have to show you what a reasonable rate would be.
11:55:27 17 They're the ones who have to build a tower like Mr. Nydegger
11:55:29 18 had here. And you'll notice, he was faulting Mr. Bero for
11:55:33 19 having a faulty foundation.

11:55:35 20 Mr. Craigun pulled a number out of thin air to
11:55:38 21 start with when building his tower for his royalty. He had
11:55:42 22 literally no foundation. So not only would you not have the
11:55:45 23 theatrics of pulling a box out from a tower, but you would
11:55:48 24 have no tower in the first place under Mr. Craigun's
11:55:50 25 analysis.

1 As the Court instructed you, a hypothetical
2 negotiation considers a royalty a willing licensor, and,
3 again, this is a hypothetical negotiation if you find the
4 patent valid.

5 What would Nox have been willing to pay -- I'm
6 sorry, what would Natus have been willing to pay and what
7 would Nox have accepted right before infringement,
8 approximately 2015, while allowing -- this is very
9 important -- while allowing Natus to make some sort of a
10 reasonable profit?

11 In this hypothetical negotiation, you have to
12 assume that Natus is a reasonable businessperson.

13 If we go to the next slide, you may remember
14 that Natus' profit is \$4.34 on its belts. What reasonable
15 person would give away 70 percent of its profit for the
16 privilege of making and selling belts? If you are going to
17 go through all of that work of making and selling belts and
18 you are going to pay a royalty to somebody, just your common
19 business experience would tell you that you wouldn't give
20 away 70 percent of that profit.

21 And, frankly, you may have heard Mr. Ferrelli
22 say that that \$4.34 is not even fully costs. So there are
23 other costs that would come out of that if you really were
24 doing an analysis. The point is, 70 percent is an
25 unreasonably high royalty rate. That's what \$3 is. \$3 is

1 what Nox is asking you for. That's not unreasonable.

2 That's reasonable.

3 Now, the undisputed facts in this case also say
4 that there are about 296,000 belts sold. As Mr. Nydegger
5 said, there's no dispute about that. We all agree what the
6 pool of stuff is we're looking at. But both Mr. Craigun and
7 Mr. Bero both acknowledged about a third of those are sold
8 in the rest of the world, ROW.

9 Basically, it means that they are not sold in
10 the United States, they're sold in countries outside the
11 United States. And this is a U.S. patent, so we have to
12 consider issues regarding the rest of the world and the U.S.
13 sales separately. Okay. You have to do that, too, when you
14 are analyzing these questions.

15 There's a major important factor when you are
16 considering the rest of the world sales, and that is this
17 idea of this Gort, Ireland thing. The idea there is in a
18 hypothetical negotiation, you have to ask yourselves, if I'm
19 Natus and I know to avoid any royalty at all, I could just,
20 instead of selling my products from China, having them come
21 and touch the United States and go back out to, you know,
22 Europe, let's say, that would be a royalty I have to pay
23 because it sat in the United States for one day.

24 If I'm negotiating a license, I would say, guys,
25 we're not going to pay you \$3 for that third of our sales,

1 because I can just reroute them through a mirror image
2 warehouse we have in Ireland and then I won't owe you any
3 royalty on that. If I'm going to pay you a royalty, that
4 has to be reasonable in light of that very important fact.

5 Then with regard to the U.S., there are three
6 major facts that Mr. Bero pointed out. The first is that
7 the \$3 royalty rate that Nox proposes completely discounts
8 Natus selling other belts. They sold a cut-to-fit built.
9 They sold a reusable belt. They sold third-party belts.
10 Their analysis did not consider that important fact, which
11 would tend to say the royalty would be lower.

12 Fact number two. It ignores that Natus belts
13 are primarily sold to Natus installs. That means in this
14 industry in the United States, the Natus devices that a
15 customer has, that's the primary customer that Natus is
16 going to be selling its belts to. That was not considered.
17 That would tend to push the royalty down.

18 And, lastly, and probably most importantly --
19 lastly and most importantly is this fact that Nox belts are
20 only sold in the United States to Nox install bases. It's a
21 customer who already has a Nox device. That's the only
22 customers that in the United States Nox sells through
23 CareFusion, its distributor, its belts to.

24 So you have to think to yourself in negotiating
25 a royalty, Nox would be willing to take a really low

1 royalty, because through Natus, if they tap into Natus'
2 customer base, they're going to be able to sell into a whole
3 new market that they otherwise would not have. That would
4 tend to show the royalty should be lower.

5 So, ladies and gentlemen, as I said, we believe
6 that in light of all of these facts, that the royalty rate
7 of \$3 is unreasonable and a royalty rate of \$1 done with an
8 analysis that Mr. Bero pointed out to you that did start
9 with some foundation -- they can take issue with it, but Mr.
10 Craighun had zero foundation -- would be more around \$1. And
11 given the total sales of 296,750, a \$1 royalty, of course,
12 reveals a total damages of \$296,750.

13 Now, we don't think you should get to that
14 question because of the invalidity one, but if you do, it's
15 your decision and your decision own. We ask that \$296,750
16 be awarded in damages.

17 So, ladies and gentlemen, this past week Natus
18 finally got to appeal to you, a jury of our peers, and asked
19 whether you believe the '532 patent should have ever issued.
20 The Patent Examiner in this case did not have the RES belt,
21 did not have McIntire, did not have the tools to do the job
22 that you have been given in this case to do.

23 As we said earlier, it's not that the Examiner
24 did a bad job. It's simply he didn't have the full set of
25 tools that you are being given now in this case, and

12:01:28 1 instruction 4.1 and 4.4 that I already mentioned to you
12:01:31 2 specifically talks about that scenario, where you have tools
12:01:34 3 the Patent Office did not. We look to you, the jury, to end
12:01:38 4 this dispute and find the '532 patent invalid.

12:01:40 5 And it's very important to note, ladies and
12:01:43 6 gentlemen, that is not a question that's just important to
12:01:45 7 Natus. It's a question that's important to every juror,
12:01:49 8 everybody in this room. It's a question that's important to
12:01:54 9 other medical device manufacturers and the public in
12:01:55 10 general. And why is that? Because this is not just Nox's
12:01:58 11 claim to a plastic snap connector against Natus. This is
12:02:03 12 their claim against anybody in the United States who wants
12:02:06 13 to make, use and sell a product like that.

12:02:09 14 Patents are a limited monopoly and they should
12:02:14 15 only be granted on true inventions because the owner of the
12:02:16 16 patent gets to take that out of the public use. It's not
12:02:19 17 just an issue regarding Natus.

12:02:21 18 The evidence shows that using a plastic snap
12:02:26 19 connector on an electrode belt was obvious, and Nox should
12:02:29 20 not be allowed to prevent all others from using that idea.
12:02:33 21 Monopolies are abhorred in the United States. You probably
12:02:36 22 have heard that. We are a free trade, free competition kind
12:02:39 23 of a country. We promote those sorts of things and a patent
12:02:46 24 is the exception. For true inventions, we let somebody take
12:02:48 25 something out of the public use. We submit to you that

1 looking at the RES belt and looking at the McIntire patent,
2 that this idea of a basic female snap connector for an
3 electrode should not be allowed to be taken out of public
4 use.

5 If I have the idea to replace a pop top on a
6 beer bottle with a twist top, a screw top, I can't go get a
7 patent on it because pop tops, twist tops, have been known
8 for years. To do so would be completely unfair. You simply
9 can't do that.

10 The '532 patent covers exactly what it says it
11 covers. It covers the basic structure for a plastic snap
12 connector. It does not cover a snap connector that provides
13 better or worse signal quality. That's not in the claims.
14 It does not provide a snap connector that provides easier or
15 less or more ease of use. It does not provide a snap
16 connector that is cheaper or more expensive. Those are not
17 part of this claim. And you will notice that when
18 Mr. Nydegger questioned our expert, Dr. Williams, not once
19 did he mention any of those things, because he knows it's
20 the words of the claims that cover the invention, not these
21 other benefits or side concepts. Those were all a
22 distraction to avoid the analytical approach that you are
23 going to have to follow when you go back into the jury room
24 and look at claim 1, look at the RES belt, and look at
25 McIntire.

1 And you can be sure, ladies and gentlemen, if
2 Natus or any other medical device manufacturer were to make
3 a claim or make a product that had all of these structural
4 limitations, but it had a different ease of use or a
5 different cost or signal quality was different, you can be
6 sure that Nox would still assert that patent against this
7 company. They know that the words cover it and you couldn't
8 go out there and make one of these things. They say, oh, it
9 has a different signal quality. You are outside our claims.
10 They know it's the words. The words read on the RES belt
11 and McIntire.

12 Ladies and gentlemen, Natus now places this case
13 in your hands. You, the jury, and only you hold the power
14 to do what the Patent Office could not do, to decide whether
15 Nox is going to be able to maintain a monopoly on a female
16 snap connector for an electrode belt, or whether this
17 invention would have been obvious to one of ordinary skill
18 in the art.

19 Would this invention have been obvious to an
20 engineer with some work experience? You have to go back
21 there and think to yourself, what is it about this claim
22 that is not obvious, what is it that's inventive, and
23 decide, are you going to allow this patent to be upheld or
24 are you going to decide that it should never have issued at
25 all?

1 We ask that you consider the evidence you've
2 heard and, of course, while we hope that you read claims 1,
3 5 and 9 and find them invalid in light of the RES belt and
4 McIntire, we know that you will consider that evidence
5 carefully and fairly and do your best job to reach a
6 decision that is just and right in this case.

7 Thank you.

8 THE COURT: All right. Thank you, Mr. Reynolds.
9 Mr. Nydegger?

10 MR. NYDEGGER: Thank you, your Honor.

11 Where is the evidence, Mr. Reynolds? He did not
12 show you one piece of evidence, not one piece of testimony,
13 not one exhibit.

14 The charade continues. I told you and -- you
15 can leave that up -- everything that you heard me say came
16 to pass.

17 Mr. Reynolds, he said that everything that is in
18 claim 1 is in RES. But when did he cross this out with his
19 red marker? Not when he talked about the RES. Not until he
20 talked about McIntire. It's fancy words and sleight of
21 hand.

22 He says that Mr. Oslan wasn't on the stand, so
23 you should find for them. Nox Medical does not have the
24 burden of proof on validity. Natus does. We don't have to
25 say a word. They have to prove it's invalid and they

12:06:36 1 couldn't. They didn't.

12:06:38 2 Mr. Oslan was on the stand for ten minutes
12:06:41 3 because that's all the time I had left.

12:06:43 4 They talked about Mr. Herrmansson.

12:06:45 5 Mr. Herrmansson is not an employee. We couldn't make him
12:06:48 6 come here. He's running his own business in Iceland. They
12:06:51 7 are trying to distract you here.

12:06:53 8 He says I was trying to distract you with my
12:06:55 9 demonstrations. No. My demonstrations exposed the fallacy
12:06:59 10 of their arguments and positions. That's not a distraction.
12:07:03 11 That's exposure.

12:07:05 12 Once again, Mr. Reynolds, he says, consider the
12:07:07 13 evidence, but he doesn't show you any evidence. He only
12:07:11 14 gets up here and he does it himself. Where is the
12:07:14 15 testimony? Where are the exhibits?

12:07:16 16 They can't rely on them because they don't
12:07:18 17 support their position. If the facts don't support your
12:07:23 18 position, you don't show them up, because it hurts you, and
12:07:26 19 that's what has happened here.

12:07:28 20 He said that you may consider the other
12:07:30 21 considerations of real world what happened when finding a
12:07:33 22 claim obvious. The instruction says, you must consider
12:07:36 23 those considerations. It's the law. It's required. Once
12:07:40 24 again, little changes in words that result in a big, big
12:07:44 25 difference in the outcome.

1 He says that it passes through the hole, but he
2 has no response for the fact that there's a space between
3 the hole and the dimple and that's where it sits. He has no
4 response for that. He didn't show you any evidence, any
5 testimony. It doesn't pass through the hole. It's all
6 contrived. It's all smoke and mirrors. You have to decide,
7 who do you believe?

8 We walked you through testimony. We took you to
9 the exhibits. We showed you what the evidence shows you.
10 They got up here and just spoke and talked and more smoke
11 and mirrors.

12 We ask you, go back to the evidence. That is
13 where you find the truth.

14 THE COURT: All right. Thank you, Mr. Nydegger.

15 Members of the jury, let me finish up by
16 explaining some things about your deliberations in the jury
17 room and your possible verdict.

18 Once you start deliberating, do not talk to the
19 jury officer, or to me, or to anyone else except each other
20 about the case. If you have any questions or messages, you
21 must write them down on a piece of paper, sign them, and
22 then give them to the jury officer. The officer will give
23 them to me, and I will respond as soon as I can.

24 I may have to talk to the lawyers about what you
25 have asked, so it may take me some time to get back to you.

1 Any questions or messages are normally sent to me through
2 your foreperson, who by custom of the court is Juror Number
3 1.

4 One more thing about messages. Do not ever
5 write down or tell anyone how you stand on your votes. For
6 example, do not write down or tell anyone that you are split
7 4 to 4, or 6 to 2, or whatever your vote happens to be.
8 That should stay secret until you are finished.

9 Your verdict must represent the considered
10 judgment of each juror. In order for you as a jury to
11 return a verdict, it is necessary that each juror agree to
12 the verdict. Your verdict must be unanimous.

13 It is your duty, as jurors, to consult with one
14 another and to deliberate with a view towards reaching an
15 agreement, if you can do consistent with your individual
16 judgment. Each of you must decide the case for yourself,
17 but do so only after an impartial consideration of the
18 evidence with your fellow jurors.

19 In the course of your deliberations, do not
20 hesitate to re-examine your own views and change your
21 opinion if convinced it is erroneous. But do not surrender
22 your honest conviction as to the weight or effect of
23 evidence solely because of the opinion of your fellow
24 jurors, or for the purpose of returning a verdict. Remember
25 at all times that you are not partisans. You are the judges

1 of the facts. Your sole interest is to seek the truth from
2 the evidence in the case.

3 A form of verdict has been prepared for you, and
4 you have already seen it during closing arguments. You will
5 take this form to the jury room, and when you have reached
6 unanimous agreement as to your verdict, you will have your
7 foreperson fill in, date and sign the form. You will then
8 return to the courtroom and your foreperson will give your
9 verdict.

10 It is proper to add the caution that nothing
11 said in these instructions and nothing in the form of
12 verdict is meant to suggest or convey in any way or manner
13 any hint as to what verdict I think you should find. What
14 the verdict shall be is the sole and exclusive duty and
15 responsibility of the jury.

16 Now that all the evidence is in and the
17 arguments are completed, you are free to talk about the case
18 in the jury room. In fact, it is your duty to talk with
19 each other about the evidence, and to make every reasonable
20 effort you can to reach unanimous agreement. Talk with each
21 other, listen carefully and respectfully to each other's
22 views, and keep an open mind as you listen to what your
23 fellow jurors have to say. Try your best to work out your
24 differences. Do not hesitate to change your mind if you are
25 convinced that other jurors are right and that your original

12:11:56 1 position was wrong.

12:11:56 2 But do not ever change your mind just because
12:11:59 3 other jurors see things differently, or just to get the case
12:12:01 4 over with. In the end, your vote must be exactly that --
12:12:04 5 your own vote. It is important for you to reach unanimous
12:12:07 6 agreement, but only if you can do so honestly and in good
12:12:10 7 conscience.

12:12:12 8 No one will be allowed to hear your discussions
12:12:15 9 in the jury room, and no record will be made of what you
12:12:17 10 say. So you should all feel free to speak your minds.

12:12:20 11 Listen carefully to what the other jurors have
12:12:22 12 to say, and then decide for yourself.

12:12:30 13 During your deliberations, you can only discuss
12:12:32 14 the case in the jury room with your fellow jurors. While
12:12:34 15 you are deliberating, you must not communicate with or
12:12:38 16 provide any information about this case to anyone else by
12:12:41 17 any means. You may not use any electronic device or media,
12:12:44 18 such as the telephone, a cellphone, smart phone, iPhone,
12:12:47 19 Blackberry or computer, the Internet, any Internet service,
12:12:51 20 any text or instant messaging service, any Internet chat
12:12:54 21 room, blog, or website such as Facebook, Snap Chat,
12:12:59 22 Instagram, LinkedIn, You Tube or Twitter, to communicate to
12:13:04 23 anyone any information about this case or to conduct any
12:13:08 24 research about this case until I accept your verdict.

12:13:17 25 If that is not clear enough, in other words,

1 you cannot talk to anyone on the phone, correspond with
2 anyone, or electronically communicate with anyone about the
3 case.

4 Let me finish up by repeating something that I
5 said to you earlier. Nothing that I have said or done
6 during this trial was meant to influence your decision in
7 any way. You must decide the case yourselves based on the
8 evidence presented.

9 So if we could ask the Court Security Officer to
10 come forward to be sworn.

11 And, members of the jury, while he's coming
12 forward, let me just tell you, the normal practice is that
13 we expect you to deliberate until 5:00 o'clock, assuming you
14 haven't reached a verdict before then. Unless I hear from
15 you otherwise that you want to have a different schedule, I
16 will, assuming you have not reached a verdict, I will expect
17 to see you at 5:00 o'clock and give you some instructions
18 for overnight. Presumably, you would come back tomorrow
19 morning to start deliberating again at 9:30.

20 All right. Come on forward.

21 (Court Security Officer sworn.)

22 THE COURT: All right. If you could follow the
23 Court security officer back to the jury room.

24 (The jury was excused to the jury room at
25 12:15 p.m.)

1 THE COURT: All right. So we'll be in recess
2 until 1:15. That's when we'll start. Okay?

3 MR. NYDEGGER: Thank you.

4 MR. REYNOLDS: Thank you.

5 (Luncheon recess taken.)

6 - - -

7 Afternoon Session, 1:14 p.m.

8 THE COURT: All right. Good afternoon,
9 everyone.

10 MR. NYDEGGER: Good afternoon.

11 THE COURT: Please be seated. Why don't we
12 begin with opening statements.

13 MR. LORIMER: Your Honor, when we spoke to your
14 staff this morning, we indicated there were a couple of
15 evidentiary issues that we thought we would put off until
16 this afternoon so we could get to the jury this morning.

17 THE COURT: I'm the one that's going to do it.
18 Why don't we just deal with them as they come up. Right?
19 It's not like we're excluding something if I have to rule on
20 an evidentiary objection.

21 MR. LORIMER: If that's the Court's preference,
22 that's what we'll do.

23 THE COURT: All right. Go ahead, Mr. Adelson.

24 MR. ADELSON: Your Honor, there's one other
25 issue that we would like to address.

1 THE COURT: All right. The clock is running, so
2 we can address it.

3 MR. ADELSON: Okay. So we would like to request
4 that the witnesses be sequestered.

5 THE COURT: All right. Well, so,
6 Mr. Halldorsson obviously doesn't have to be sequestered,
7 but Mr. Hoskuldsson should be sequestered.

8 MR. LORIMER: He's the first witness.

9 MR. ADELSON: Our intention was to call Mr.
10 Hoskuldsson first. If that's your Honor's preference, we
11 can reverse that order.

12 THE COURT: I don't care what order you call
13 them in.

14 MR. ADELSON: Okay.

15 THE COURT: But they have a right to have Mr.
16 Halldorsson as their representative of Nox, so he's not
17 going to be sequestered.

18 MR. ADELSON: Understood, your Honor.

19 THE COURT: But if you are going to call
20 Mr. Halldorsson first, then Mr. Lorimer or someone will
21 explain to Mr. Hoskuldsson what we're doing here?

22 MR. LORIMER: Sure.

23 The order they gave us --

24 THE COURT: No. I understand. But they can
25 switch it up if they want.

13:15:37 1 MR. LORIMER: Sure.

13:15:41 2 Are you going to call -- are you switching?

13:15:44 3 MR. ADELSON: Yes.

13:16:25 4 (Pause.)

13:16:34 5 MR. ADELSON: Your Honor, inequitable conduct is
13:16:36 6 an offense against the Patent Office and the public and
13:16:39 7 deserves its harsh penalties because the public trust has
13:16:42 8 been violated.

13:16:43 9 The Patent Office and indeed the entire U.S.
13:16:44 10 patent system relies on applicants to abide by their duty of
13:16:48 11 candor and to be forthright in their dealings with the
13:16:51 12 Patent Office. This duty of candor applies to inventors,
13:16:54 13 prosecuting attorneys, and anyone who substantially is
13:16:58 14 involved. Enforcements of this duty falls to the Court
13:17:01 15 because the Patent Office simply cannot investigate these
13:17:04 16 matters.

13:17:04 17 Now, most often inequitable conduct happens when
13:17:08 18 a material piece of prior art is withheld or when misleading
13:17:11 19 statements are made to the Patent Office.

13:17:13 20 Inequitable conduct is proven by clear and
13:17:17 21 convincing evidence that material information is withheld or
13:17:21 22 misrepresented with intent to deceive. And the PTO ruled,
13:17:25 23 and specifically 37 C.F.R. 1.56(a), require applicants to
13:17:31 24 provide all, very clearly even all information known to be
13:17:38 25 patentable. I would have projected that up here, but it's

1 stated three times in that section.

2 And materiality is but for materiality in that a
3 claim would have not been allowed if the Examiner knew it
4 was withheld information. And there is, however, no but for
5 requirement when a patentee engages in affirmative acts of
6 egregious misconduct such as the filing of an unmistakably
7 false affidavit.

8 Because the direct evidence of intent to deceive
9 is rare, district courts may infer intent from indirect and
10 circumstantial evidence. The clear and convincing
11 evidentiary standard, however, requires that the intent to
12 deceive be the single most reasonable inference drawn from
13 the evidence.

14 In this case, the evidence overwhelmingly showed
15 that every single prior art reference relating to Nox's own
16 products was withheld or otherwise concealed from the Patent
17 Office. All three individuals, Mr. Herrmansson, Mr.
18 Hoskuldsson and Mr. Fridriksson owed a duty of candor to the
19 Patent Office at the relevant time.

20 Now, Mr. Herrmansson is a named inventor, so
21 there's no question about his duty requirement. Mr.
22 Hoskuldsson has now been named an inventor on the '532
23 patent. Now, there are some serious questions as to whether
24 he truly is an inventor on that patent. He was subsequently
25 involved in the prosecution of the '532 patent, having taken

1 an active role in responding to office actions, yet he did
2 not make his status as an inventor known until after the
3 patent issued. Regardless of whether he is an inventor or
4 not, he owed a duty of candor to the Patent Office by a
5 substantial effort in support of its prosecution and by his
6 later representation to the Patent Office that he should be
7 named an inventor.

8 Mr. Fridriksson was the original patent agent in
9 Iceland that Nox hired to help with patent prosecution, and
10 although he is not an attorney, he, too, was substantively
11 involved in the prosecution of the application that ended up
12 as the '532 patent. And the list of withheld references is
13 long.

14 First, the application that issued as the '539
15 patent, which we have discussed in this case as the
16 Herrmansson reference, was concealed from being prior art
17 until after the '532 patent issued, and it only became prior
18 art with Nox's change to the inventorship to add Mr.
19 Hoskuldsson.

20 Second, the Nox RES belt or the semi-disposable
21 belt, which was first sold more than a year before the
22 priority date of the '532, has a flexible textile belt with
23 a plastic connector and a mating, for mating for a biometric
24 device.

25 Third, the 2009 CareFusion catalogue, which

13:20:27 1 advertises the sale of the Nox RES belt.

13:20:28 2 Fourth, international design registrations on
13:20:32 3 the Nox RES belt connector design, which disclose the end
13:20:36 4 connector of the Nox RES belt.

13:20:38 5 Fifth, the Nox PRIT belt, an earlier design
13:20:44 6 shown in the United States in March of 2008, which has the
13:20:46 7 same type of plastic connector and flexible belt using a
13:20:50 8 metal snap instead.

13:20:52 9 The completeness with which Nox's own prior art
13:20:55 10 was withheld or concealed from the Patent Office goes a long
13:20:59 11 way evidencing an intent to deceive the Patent Office.

13:21:03 12 In addition, Mr. Hoskuldsson's purported status
13:21:07 13 as an inventor was concealed from the Patent Office,
13:21:10 14 assuring that the Herrmansson reference could not be legally
13:21:13 15 considered prior art. For the entirety of the prosecution,
13:21:17 16 the application just listed Mr. Herrmansson. So while the
13:21:21 17 earlier Herrmansson application was uncovered in an
13:21:24 18 international search and provided to the PTO, it was not
13:21:27 19 legally available as invalidating prior art.

13:21:33 20 There is also evidence that Mr. Herrmansson, the
13:21:36 21 originally named inventor, who still consults for Nox,
13:21:38 22 identified additional prior art and provided to Messrs.
13:21:42 23 Hoskuldsson and Halldorsson, but that prior art never made
13:21:45 24 it to the Patent Office.

13:21:47 25 And then there are Mr. Fridriksson's admissions.

1 He is the Icelandic patent agent who initially controlled
2 U.S. prosecution. He admitted that while not being admitted
3 to practice before the Patent Office, he usurped the role of
4 U.S. counsel by making his own determination on materiality
5 and not submitting prior art identified by his client.

6 Finally, there is the fact that eight months
7 after issuance and six months into this litigation, Nox
8 changed the inventorship on the '532 patent. Even though
9 this litigation was pending, Nox did not inform Natus of its
10 inventorship change. In fact, the prosecution history that
11 Nox submitted to the Court as Plaintiff's Trial Exhibit 129
12 notably admits all documents relating to this inventorship
13 change.

14 Natus only ended up uncovering this inventorship
15 change while investigating Nox's further threats against
16 Natus. And Nox continues to play games with its
17 inventorship issue by persisting in arguments that have
18 absolutely no basis in the law. There is no substance to
19 Nox's position. It is a poorly conceived attempt to argue
20 that the withheld disclosures were cumulative of the
21 Herrmansson reference. The reality is that Herrmansson, the
22 reference, could not be considered prior art, because Mr.
23 Hoskuldsson didn't identify himself as an inventor, and none
24 of the other material prior art could be considered because
25 none of it was submitted to the Patent Office.

1 Now, Nox doesn't deny that Herrmansson was not
2 available as prior art, but yet we heard last Friday, Nox
3 argues that because an Examiner marked an IDS form
4 considered, that means that the Examiner substantively
5 considered Herrmansson's disclosures. That's nonsense. All
6 the Examiner did was acknowledge receipt of a listing of
7 references. It would have been legal error for the Examiner
8 to have subsequently considered Herrmansson, which goes
9 against the longstanding proposition that Government
10 officials like an Examiner do their job correctly.

11 To sustain its unbelievable position, Nox would
12 need clear and convincing evidence that the Examiner did, in
13 fact, commit legal error, but Nox doesn't have any of that
14 evidence, and there's absolutely no basis for Nox to
15 continue to argue that the withheld references are
16 cumulative of Herrmansson.

17 There is also no question that the withheld
18 references, and at a minimum, the Nox RES belt and the
19 concealed availability of Herrmansson as prior art are but
20 for material. The international search report in the file
21 history of the '532 patent identified Herrmansson as a
22 document of particular relevance over which on its own, the
23 claimed invention could not be considered novel.

24 Moreover, Mr. Hoskuldsson on multiple occasions
25 identified the claimed subject matter of the '532 patent as

1 a simplified version of the Nox RES belt, removing any doubt
2 to its essential materiality.

3 Separately, there are other questions as to
4 whether Mr. Hoskuldsson is truly an inventor that should be
5 named on the '532 patent. He was highly involved in the
6 prosecution of the '532 patent as evidenced by a report he
7 prepared in response to the Patent Office's rejection of
8 that application. In that report, he specifically
9 identified the hook of the '532 patent as a key feature that
10 he now claimed he invented, but inexplicably, he didn't know
11 in 2014 that he was the inventor. He then became to realize
12 only later that he was an inventor in the middle of this
13 litigation is frankly unbelievable.

14 Something simply just isn't right. He either
15 withheld his inventorship in 2014 or falsely claims to be an
16 inventor now. Either way, it doesn't matter. Falsely
17 representing to be an inventor is a misrepresentation, and
18 whatever the motivation behind it, its egregious conduct
19 does not require a showing of materiality.

20 That leaves intent to deceive, which this trial
21 is about.

22 Rarely, if ever, there's a smoking gun, a memo
23 evidencing a specific intent to deceive the Patent Office,
24 but here, there's a chain of evidence that leads without
25 doubt to the conclusion that these individuals sought to

1 deceive the Patent Office.

2 Tellingly, despite adding Mr. Hoskuldsson as
3 an inventor here in the United States, Nox hasn't added
4 him as an inventor in Europe. It has the same claims in
5 Europe, but he's not an inventor there, he's only an
6 inventor here.

7 Now, we don't truly understand the reasons
8 behind Nox's conduct, but its selective inventorship reeks
9 of deceit. This phase of the trial is independent from the
10 jury's verdict. Even if the '532 patent is upheld by the
11 jury, we believe the evidence shows that but for material
12 evidence, information sufficient for an Examiner to reject
13 claims of the '532 patent was knowingly and intentionally
14 withheld from the Patent Office by one or more of these
15 individuals, rendering the '532 patent and its progeny
16 unenforceable.

17 Thank you, your Honor.

18 THE COURT: Thank you, Mr. Adelson.

19 MR. LORIMER: Your Honor, there's a great story
20 told about Abraham Lincoln. He used to ride circuit
21 Illinois, and one day somebody approached him and said,
22 Mr. Lincoln, see that dog over there? He said, yeah. He
23 said, if I call that tail a leg, how many legs does the dog
24 have? And Lincoln is reported to have said, he still has
25 four. I don't care whether you call the tail a leg, he has

1 still got four legs. That is what we're about here.

2 Natus is making all sorts of wild accusations
3 about these, about Mr. Hoskuldsson, about Mr. Herrmansson,
4 about Mr. Halldorsson, accusations that have zero basis in
5 fact.

6 Let's talk about, first of all, I think the
7 Court may have noted that Mr. Adelson said that Nox has the
8 burden of proving by clear and convincing evidence that Mr.
9 Hoskuldsson was properly named an inventor or that the
10 Examiner didn't consider Herrmansson. Nox doesn't have a
11 burden on inequitable conduct. Zero burden.

12 THE COURT: Yes. I take that to be more
13 rhetorical than an actual statement of fact.

14 MR. LORIMER: I think rhetorical is perhaps
15 generous.

16 And so let's talk about the factual
17 underpinnings of this argument. The factual underpinnings
18 of the argument are these. That Mr. Hoskuldsson, a citizen
19 of Iceland, Mr. Herrmansson, a citizen of Iceland, neither
20 of whom are trained in patent law of any sort,
21 Mr. Fridriksson, who is an Icelandic patent agent, not a
22 U.S. patent agent, somehow knew in their heart of hearts
23 that Mr. Hoskuldsson was an inventor, and then they decided,
24 oh, shoot, we can't name him as an inventor, because if we
25 name him as an inventor, the '539 patent will be considered,

1 and if the '539 patents are considered, our claims are
2 toast.

3 That is just unbelievable. They have in their
4 depositions not asked a single witness if they understood
5 that concept, not one. There is absolutely no evidence on
6 the intent issue that anybody understood Section 102(e), had
7 ever heard of it or knew of its practical effects, zero. So
8 the notion that there was somehow this grand, almost
9 criminal conspiracy is just silly.

10 They have to prove that intent is the single
11 most reasonable inference, not just an inference, but the
12 single most reasonable inference, and they have to prove it
13 by clear and convincing evidence.

14 Intent to deceive is not even a reasonable
15 inference much less the single most reasonable inference.

16 Now, Mr. Adelson got up here said, well, it's
17 clear that the Examiner did not consider Herrmansson '539.
18 We have a disagreement with Mr. Adelson about that.

19 If you could put up PTX-2 for a moment, please.
20 This is, of course, the face page of the '532 patent. Now,
21 if you go to page 2.

22 Right there on the right-hand side under the
23 references considered is Herrmansson. That's the
24 application that became Herrmansson.

25 Now, if you go to the prosecution history, which

1 is PTX-129, this is an IDS, and if you put up page 16 or 7 I
2 think of that it is, this is an IDS that was submitted in
3 that case, an IDS submitted by Nox.

4 Right there, the second line is Herrmansson.
5 That's the same application we saw on the face of the
6 patent. And at the bottom of this page, Mr. Patel, who was
7 the Examiner in this case, says, all references considered
8 except where lined through HP. Well, Herrmansson isn't
9 lined through. That says to anybody who has got any common
10 sense that they were considered. But Mr. Adelson says, no,
11 as a matter of law, they can't.

12 He suggests to the Court that examiners who are
13 presumed to have done their duty correctly never make
14 mistakes, and if they do make a mistake, then the patent is
15 invalid. Well, that is clearly not the law. Examiners make
16 mistakes all the time and it doesn't invalidate the patent,
17 it doesn't invalidate the presumption of validity.

18 Now, this Examiner may have made a mistake. It
19 says that he considered this. This IDS, he says that there
20 was no substantive analysis of the Herrmansson reference in
21 the prosecution history. That happens all the time. The
22 patent owner, the applicant, submits a bunch of references
23 to the office. The office says, I considered them or I
24 didn't. Some of them it relies on and some of them it
25 doesn't. But that doesn't mean that it wasn't considered,

1 the fact that he didn't cite it in an office action. It
2 says it was considered.

3 But put aside for a minute whether the Examiner
4 did or did not consider it. There's no -- by the way,
5 there's no evidence from the Examiner about what he did.
6 This legal presumption that Mr. Adelson cites to is
7 inconsistent with the facts on the face of the patent.

8 But let's assume for a moment that the Court
9 accepts that notion that he couldn't consider it. One has
10 to ask this question. If I were an applicant for a patent,
11 and I wanted to hoodwink the Examiner, I wanted to deceive
12 him, and I wanted to withhold a reference so that he
13 couldn't consider it, it seems pretty unlikely that I would
14 put it smack dab in front of the Examiner and say, here it
15 is, it's on my IDS, please consider it, and hope in my evil
16 heart that the Examiner would say, no, can't do it. You
17 know, we have inventive -- unity of inventorship here, so I
18 can't do it.

19 So I've got all of these things concocted in my
20 brain, and the reference I'm trying to hide I put right in
21 front of him instead of going outside, digging a hole and
22 burying it and burning it. That's what happened in this
23 case. Put it right smack in front of the inventor -- excuse
24 me, the Examiner. That hardly bespeaks clear and convincing
25 evidence of intent to deceive.

1 Now, let's talk for a moment about materiality.

2 Mr. Adelson talked to the Court for a minute about -- and
3 they've got some exhibits that we've objected to, about what
4 happened in Europe. There were some applications that were
5 pending in Europe off the PCT case. And he says, oh, well,
6 you know, wasn't named as a co-inventor over there. We've
7 got these inconsistencies. It all tells the Court that this
8 guy is a bad guy and he's lying.

9 There's a serious problem with that. This is
10 about a claim of inequitable conduct in this country, not in
11 Europe. The standards in Europe are different than the
12 standards in the United States. The claims are different in
13 the European patent than they are in the U.S. case. The
14 claims in the European patent were broader than they are in
15 the U.S. case. They're completely different standards, and,
16 again, somehow, Natus has imbued Mr. Hoskuldsson and
17 Mr. Herrmansson and Mr. Halldorsson not only with the
18 knowledge U.S. patent law, but European patent law for which
19 there is zero, zero factual basis, none.

20 And then we have this supposedly long list of
21 prior art that, notwithstanding they gave it to the Patent
22 Office, was supposedly concealed. The ones he references
23 were the Herrmansson patent, the '539, the Nox RES belt, the
24 CareFusion.

25 I would like to talk about those together.

1 There isn't any doubt they're all about the same thing.

2 They are all about the semi-disposable belt. Certainly, if
3 you find that there was no intent to withhold the
4 Herrmansson reference, you've gotten rid of the other two,
5 because they're the same thing. It's cumulative. There is
6 no obligation, no duty to disclose cumulative references.
7 That's black letter law.

8 Let's talk about the other ones he named. The
9 other ones he named were the international design
10 registrations, which are design patents, basically. They
11 are European design patent applications. And those European
12 design patent applications are simply the ornamental
13 non-functional appearance of a product. They show one face
14 of the product. They show the face that you would normally
15 insert the stud through. They don't say whether they're
16 plastic, whether they are steel, whether they are
17 fiberglass. They don't show anything about what fastens the
18 snap, the electrode. They don't show anything about the
19 inside. They don't show anything about a belt. They don't
20 show anything about engaging members. They don't show
21 anything about a conductor wire. They show nothing.

22 So Herrmansson, '539, which was submitted to the
23 Patent Office, independent of whether it was considered, it
24 was submitted. The international design registrations are
25 really a very small subset of Herrmansson '539.

1 And then we've got what they call this PRIT
2 belt. The PRIT belt, you will see as the evidence comes in,
3 was a metal snap. It was a metal snap that was not elastic.
4 It did not have the radial flexibility of the hole that is
5 talked about in this patent. It was never produced. It was
6 never sold. I mean, there are a couple samples, but it was
7 never sold to anybody. And it has the interior spring wire
8 just like the RES belt. It's nothing like the patent in
9 suit, nothing like the claims of the '532 patent.

10 Now, they talk about materiality, and Mr.
11 Adelson was correct when he said materiality is a but-for
12 test. That is, the defendant in this case has the burden of
13 proof to prove by clear and convincing evidence that if this
14 reference had been submitted, the claims would not have been
15 allowed but for, wouldn't happen.

16 Well, we're fortunate in this case. We know the
17 answer to that question. And if I could share the answer to
18 that question how I know that.

19 Let's put up Exhibit 108.

20 As the Court is aware, this case was involved in
21 an IPR, and at the beginning of an IPR, they filed, the
22 petitioner filed the petition. Six months later, the office
23 decides whether it's going to institute trial or it isn't.

24 And in this case, one of the references they
25 relied on heavily was the Herrmansson '539. Now, it's

1 important to realize that in the IP, the burden of proof is
2 preponderance just like it is in the Patent Office. And
3 they used the broadest reasonable interpretation claim
4 construction just like they do in the Patent Office. They
5 say that in order to institute an IPR, a trial in an IPR,
6 all you have to do is prove a reasonable likelihood -- not
7 but for, but a reasonable likelihood that one or more of the
8 claims would be rejected based on the reference or the
9 combination that you are asserting. That's why this is
10 really interesting.

11 Now, let's go to, I believe it's page 16 or 7 of
12 this exhibit.

13 This is what they said about Herrmansson '539.
14 We agree with the patent owner and find that Herrmansson
15 does not teach the limitation of the conductor passing
16 through the receiving hole because the wire conductor does
17 not appear to penetrate the receiving hole, and then it goes
18 on and talks about that.

19 It says, instead that Herrmansson describes a
20 loop of wire that lies over the hole. Remember, the claims
21 require that it pass through, which the Court has determined
22 means it enters, it passes through and it exits. And here
23 they say, Herrmansson doesn't teach that because it's over
24 the hole. And more importantly, the PTAB, a branch of the
25 Patent and Trademark Office, said, we will not institute on

1 Herrmansson. In other words, there is no but for
2 materiality. The same, the same governmental office who is
3 examining patents has examined this reference in light of
4 these claims and said, no go. It's not material. It's not
5 even material enough to institute a trial in the PTAB, which
6 is a very low standard. It's a lot lower than but for.

7 So, your Honor, at the end of the day, this
8 claim of inequitable conduct is specious. There's another
9 example of Natus coming after a small company, trying to
10 spend it under the table and making scurrilous allegations
11 against good people. They have not proven materiality.
12 They can't prove it. They can't prove intent, and the claim
13 is just silly.

14 THE COURT: All right. Thank you.

15 MR. ADELSON: Your Honor, may I have a couple
16 minutes to respond?

17 THE COURT: No. Call a witness.

18 MR. ADELSON: Natus calls Mr. Peter Halldorsson.

19 DEFENDANT'S TESTIMONY

20 PETUR MAR HALLDORSSON, having been
21 duly sworn as a witness, was examined and testified as
22 follows ...

23 MR. ADELSON: May I approach with binders?

24 THE COURT: Sure.

25 (Mr. Adelson handed binders to the Court.)

Halldorsson - direct

13:42:06 1 MR. ADELSON: May I approach the witness, your
13:42:12 2 Honor?

13:42:12 3 THE COURT: Sure.

13:42:12 4 (Mr. Adelson handed a binder to the witness.)

13:42:17 5 DIRECT EXAMINATION

13:42:25 6 BY MR. ADELSON:

13:42:25 7 Q. Thank you for being here today, Mr. Halldorsson. I do
13:42:27 8 understand that there was some confusion regarding your need
13:42:29 9 to be here for testimony today. We hope that you can shed
13:42:33 10 some light on some matters for us.

13:42:36 11 You've previously testified that you joined Nox
13:42:39 12 in 2011; is that correct?

13:42:41 13 A. Yes. October 2011.

13:42:43 14 Q. And when you joined, you became the CEO of Nox; is
13:42:43 15 that correct?

13:42:48 16 A. That is correct.

13:42:48 17 Q. And when you joined Nox, who had been the previous
13:42:53 18 CEO?

13:42:54 19 A. Sveinbjorn Hoskuldsson.

13:42:59 20 Q. Mr. Hoskuldsson remained at Nox after you became the
13:43:02 21 CEO; is that correct?

13:43:03 22 A. Oh, yes, he did.

13:43:04 23 Q. And at the time you joined Nox, who at Nox was
13:43:07 24 responsible for intellectual property matters?

13:43:07 25 A. Kormakur Hermannsson.

Halldorsson - direct

1 Q. Was anyone else handling intellectual property
2 matters?

3 A. No.

4 Q. And when you arrived at Nox, what firms were handling
5 intellectual property matters for Nox?

6 A. When I joined, it was Arnason Faktor.

7 Q. And was that the only firm that was handling
8 intellectual property matters?

9 A. To the best of my knowledge, yes.

10 Q. And when you joined Nox, did Nox have direct contact
11 with any U.S. firm on patent issues?

12 A. Not to my knowledge, no.

13 Q. Did there come a time in your role as CEO where you
14 became the person responsible for handling intellectual
15 property matters?

16 A. No.

17 Q. Do you recall testifying on this matter before,
18 Mr. Halldorsson?

19 A. I have -- I have been handling conversations with our
20 agent, with our experts, experts, provide advice on the
21 matter.

22 MR. ADELSON: Ben, if you could please pull up
23 deposition transcript 97, line 3.

24 BY MR. ADELSON:

25 Q. Do you see on the screen there, Mr. Halldorsson, a

Halldorsson - direct

question by Mr. Nicgorski: Regarding part of your responsibilities as CEO, do you also manage legal matters?

A. Would you tell me the line?

Q. Line 3.

A. Line 3.

Q. And your response is, that sits on my table to manage that and consult with advisors?

MR. LORIMER: Objection, your Honor. This is not impeachment. It's what he said.

THE COURT: It's marginally different.

BY MR. ADELSON:

Q. Do you recall this now?

A. That sits on my table to manage that and consult with advisors.

Q. Are you the person that's then in contact with your legal counsel on intellectual property matters?

A. I have been in contact with them, yes.

Q. Okay. When did Nox first directly engage with a U.S. firm to handle its patent matters?

A. It was in August 2014.

Q. August 2014?

A. That is to the best of my knowledge and memory, yes.

Q. And was that firm Workman Nydegger?

A. That is correct.

Q. And was there some issue with the fact that Arnason

Halldorsson - direct

1 Faktor was doing for you that wanted you to switch firms?

2 A. We had been -- it had been brought to our attention
3 that our products were being copied, and we were of the
4 opinion after having consulted with probably the largest
5 company in Iceland that handles IP matters in the medical
6 device arena, Ossur, that Workman Nydegger had been working
7 with them, and we got some good advice.

8 And it was clear to me at that time that we
9 would be doing the right thing and engaging with a U.S.
10 experts on the matters, yes.

11 Q. And since that time, I think you said August 2014, has
12 Workman Nydegger been Nox's exclusive representation on U.S.
13 patent matters?

14 A. Yes.

15 Q. And at the time that Nox first engaged Workman
16 Nydegger, did you or anyone else meet directly with
17 attorneys from Workman Nydegger?

18 A. I did, yes.

19 Q. And who else met with them?

20 A. I was -- the first meeting that we had was with Mr.
21 Hoskuldsson.

22 Q. Okay. Was that in Iceland or did you come to the
23 United States for that meeting?

24 A. That meeting was in Iceland.

25 Q. And at that time that you had the meeting, did you

Halldorsson - direct

1 discuss your pending patent application?

2 MR. LORIMER: That's a yes or no. We're getting
3 very close to privilege here.

4 BY MR. ADELSON:

5 Q. It is a yes-or-no question.

6 A. Could you repeat the question, please.

7 Q. At that time that meeting, did you discuss Nox's
8 pending U.S. application?

9 A. Yes. I think that was one of the topics discussed.

10 Q. And one of the pending Nox applications that Workman
11 Nydegger assumed responsibility for was the application that
12 issued as the '532 patent; is that correct?

13 A. The '532, you said?

14 Q. Yes.

15 A. That is correct.

16 Q. Was that the only pending Nox application at the time?

17 A. No. I think there were others.

18 Q. And were the other ones in at least partially naming
19 Mr. Hoskuldsson as an inventor?

20 A. That is correct.

21 Q. Did you coordinate the transfer of files from Arnason
22 Faktor to Workman Nydegger?

23 A. I participated in that, yes.

24 Q. And when you say participated, can you give us a brief
25 explanation of what you mean?

Halldorsson - direct

1 A. In the transfer of information to Workman Nydegger, we
2 did need to share with them information about the
3 technology, information about the RIP technology and quite a
4 substantial amount of information that were needed to have
5 them to understand the matters and the technology that we
6 had at stake.

7 Q. Okay. Just to be clear, my question was really more
8 directed, were you involved in directing Arnason Faktor to
9 transfer their files to Workman Nydegger?

10 A. Yes. I think I did -- I think that is what I did,
11 informing Arnason Faktor that we had engaged with a specific
12 firm in the U.S. for handling our matters, yes.

13 Q. And does Nox still use Arnason Faktor for its
14 international patent work outside the United States?

15 A. In some instances, yes.

16 Q. And is Mr. Karl Einar Fridriksson the person at
17 Arnason Faktor that Nox works with?

18 A. One of them, yes. We work with others.

19 Q. Are you the only person at Nox who corresponds with
20 Workman Nydegger on intellectual property matters?

21 A. No.

22 Q. Who else does?

23 A. That would be quite a large -- during this case, the
24 whole correspondence with gathering information, providing
25 all the information that we have into the case, that had

Halldorsson - direct

1 been quite a lot of people within my organization that have
2 gotten involved in those discussions, but I had been, I
3 think it's fair to say, the one that's channeling this
4 discussion, but there are other people that have got
5 involved during our obligation to provide information as
6 requested into this Court case.

7 Q. Okay. Setting aside the court case, strictly on
8 matters relating to prosecution matters, are you the person
9 that corresponds with Workman Nydegger?

10 A. Not the only one, no.

11 Q. Is there anyone else other than yourself and Mr.
12 Hoskuldsson that communicates with Workman Nydegger on those
13 matters?

14 A. Yes.

15 Q. And who are those individuals?

16 A. One of them is the leader of what we call the research
17 team, the specific team that works on new technology and new
18 developments. His name is Jon Skyrniragustsson. I really
19 hope that I'm spelling this correctly. It can be confusing
20 sometimes. But that is the name.

21 Q. And kind of switching now to before you started
22 working at Nox, where had you been working prior to running
23 Nox in 2011?

24 A. Where do you want to start?

25 Q. Immediately prior?

Halldorsson - direct

1 A. Immediately prior I was working with a company, an
2 investment company -- sorry. I was working under a
3 consultancy agreement with CareFusion.

4 Q. Okay. And how long had you been working at
5 CareFusion -- excuse me, under a consultancy agreement for
6 CareFusion?

7 A. I was self-employed during that time as a consultant
8 for CareFusion. The engagement is signed in December 2010,
9 and I entered that, I entered that engagement or entered the
10 consultancy the first half of January 2011.

11 Q. Can you give us just a brief description of your
12 responsibilities working in this consul tan see for
13 CareFusion?

14 A. At that time, CareFusion was the exclusive distributor
15 for Nox Medical products entirely, in all markets. They had
16 certain issues with their distribution channels. They were
17 deciding on the strategies. They were deciding what to do
18 in that sleep field.

19 They were trying to investigate whether sleep --
20 whether the sleep business was a future opportunity for
21 them, so my engagement was working in my best capacity to
22 provide strategies and work with them in building those
23 strategies.

24 Q. So while you were at CareFusion, you were obviously
25 aware of Nox Medical?

Halldorsson - direct

1 A. Absolutely, yes. Very much so.

2 Q. And you were familiar with Nox's products at that
3 time?

4 A. During my consultancy, I became aware of the products
5 and started to learn exactly what they were doing.

6 Q. Did you only become aware of Nox Medical's products
7 through your consultancy for CareFusion or had you known
8 about them before?

9 A. I knew about the establishment of the company. I had
10 worked with all these guys during my time at Flaga, from
11 2001 until 2006, but I cannot say that I was involved or
12 knew their products through the details. I was very busy
13 doing other businesses and under other employment from 2006
14 until 2010.

15 Q. During your consultancy for CareFusion, you were
16 familiar with the Nox T3 device; is that correct?

17 A. Yes.

18 Q. All right. And you were also familiar with the
19 accessories that go with the Nox T3 device at that time; is
20 that correct?

21 A. Obviously, yes, I was.

22 Q. And, for example, you knew that Nox's semi-disposable
23 or the RES belt was a product of Nox at that time; is that
24 correct?

25 A. Yes, I did.

Halldorsson - direct

1 Q. And just to be clear when we talk about the
2 semi-disposable belt, you understand we're talking about the
3 same devices that we had in this trial, you know, had
4 physical samples of it?

5 A. That's correct. We have seen the semi-disposable belt
6 in the trial.

7 Q. And there's no dispute that the Nox RES belt or the
8 semi-disposable prior art is the '532 patent; is that
9 correct?

10 MR. LORIMER: Your Honor, this is expert
11 testimony for Pete's sake.

12 THE COURT: Well, you know, there is no dispute,
13 but I'm going to sustain the objection. If you want to ask
14 him what his opinion is, sure.

15 MR. ADELSON: Sure.

16 BY MR. ADELSON:

17 Q. The Nox RES belt has a connector that snaps on an
18 electrode; is that correct?

19 A. That is correct.

20 Q. Okay. And were you familiar with CareFusion's catalog
21 prior to joining Nox?

22 A. Familiar with it? I -- that would probably be a wrong
23 assumption, but I had seen it.

24 Q. Okay. Did you know that Nox Medical's products were
25 advertised in a CareFusion catalog?

Halldorsson - direct

1 A. Yes. I had seen it to that extent, Nox products were
2 images and they were being mentioned in that catalog since
3 distributed by CareFusion.

4 Q. And the Nox RES belt was advertised in the 2009
5 CareFusion catalog; is that correct?

6 A. There was an image of the RES belt in that catalog,
7 correct.

8 Q. And at any time did you ever provide information to
9 U.S. counsel showing the Nox RES belt in the CareFusion
10 catalog?

11 A. What time frame are you talking about now.

12 Q. Let's start with any time.

13 A. During this whole trial and gathering of information,
14 I -- I have heard the RES, the CareFusion catalog
15 terminology many, many, many times. But whether I did
16 provide it to our counsel, I -- I do not remember. I may
17 well have, but I do not remember whether that was some
18 document that I gathered and got over to them. That may
19 well have been the case.

20 Q. Okay. And you mentioned that you were just discussing
21 this during this litigation. Did you do it at any time
22 prior to this litigation?

23 A. I don't think so, no.

24 Q. Do you know if anyone else at Nox provided information
25 on the CareFusion catalog, the 2009 catalog, to U.S.

Halldorsson - direct

1 counsel? And, again, prior to this litigation.

2
3 A. No. To the best of my knowledge, I don't think so.

4 Q. And do you have any understanding as to why it wasn't
5 provided before the '532 patent issued?

6 MR. LORIMER: Foundation, your Honor,
7 particularly relating to him.

8 THE COURT: I'm sorry, Mr. Lorimer. You'll have
9 to speak up a little bit.

10 MR. LORIMER: I object on foundation for anyone
11 except the witness.

12 THE COURT: Well, if he knows.

13 THE WITNESS: Could you repeat the question,
14 please?

15 BY MR. ADELSON:

16 Q. Sure. Let's start with: Do you know if anyone ever
17 provided -- you already answered that you don't believe
18 anyone ever provided the CareFusion catalog to U.S. counsel
19 prior to the issuance of the '532 patent; is that correct?

20 A. You asked me prior to litigation, but not prior to the
21 issuance.

22 Q. Okay. Do you still believe that it was provided after
23 the issuance and before this litigation?

24 A. If I had provided it, that was definitely before the
25 issuance, which is June 16th, 2015.

Halldorsson - direct

1 Q. I'm sorry. You are saying now that you did provide
2 the CareFusion catalog?

3 A. If I had provided it, that must have been before the
4 issuance.

5 Q. You would have provided --

6
7 A. My memory.

8 Q. Okay. And you are aware that the CareFusion catalog
9 does not appear on the face of the '532 patent, is that
10 correct, as a cited reference?

11 A. I'm aware of that, yes, because it demonstrates a
12 different product, a different connector.

13 Q. Okay. Mr. Hoskuldsson, do you recall from your
14 earlier testimony that we discussed your letter to a Ms.
15 Cookie Wei?

16 A. My name is Halldorsson. You says Hoskuldsson.

17 Q. I apologize. Mr. Halldorsson, do you recall that you
18 previously provided testimony that, regarding a letter that
19 you sent to Ms. Cookie Wei?

20 A. I do.

21 Q. Okay.

22 MR. ADELSON: If we can show that, please.

23 BY MR. ADELSON:

24 Q. This is that letter; is that correct?

25 A. That is correct.

Halldorsson - direct

13:59:41 1 Q. And did you prepare this letter?

13:59:42 2 A. I did.

13:59:43 3 Q. Okay?

13:59:46 4 MR. ADELSON: And, Ben, if you could go to the
13:59:48 5 last page. If you can blow that up, please.

13:59:58 6 BY MR. ADELSON:

14:00:00 7 Q. This is a listing characterized as a summary of
14:00:06 8 granted and pending patents of Nox; is that correct?

14:00:11 9 A. That is correct.

14:00:12 10 Q. Did you prepare this summary?

14:00:14 11 A. I pulled this together, yes, from documents that I had
14:00:17 12 and, yes, I did. I wrote that letter and signed it.

14:00:21 13 Q. Okay. And at the time of this letter, which was
14:00:27 14 February 10th, 2014, both the international application and
14:00:29 15 the U.S. publication relating to the '532 patent had both
14:00:34 16 published; is that correct?

14:00:35 17 A. That is correct.

14:00:38 18 Q. Now, if you were informing Ms. Wei about the Nox
14:00:42 19 intellectual property relating to the disposable belt, why
14:00:45 20 aren't those listed?

14:00:48 21 A. I cannot answer that question, but there is, as I have
14:00:51 22 pointed out earlier, a very clear reference to the PCT
14:00:56 23 application that had to do with the same product, and I have
14:01:00 24 to state that this was done, as I have stated previously,
14:01:05 25 just before midnight.

Halldorsson - direct

1 It has been brought to our attention that our
2 product is being copied and I'm sending out the notice to
3 Sinbon, and a few hours later, or a few days later I'm on an
4 airplane sitting down with them to have a discussion about
5 this.

6 So this was done in a pretty much rush I had to
7 notify them, and whether I could have added something else
8 there, that must have been an oversight.

9 Q. Okay. Now, the last line of this listing includes the
10 EU registered design.

11 Do you see that?

12 A. I do.

13 Q. And that references a design registration on the Nox
14 RES belt; is that correct?

15 A. Not necessarily on the RES belt, no, it does not show
16 any mechanical design. It doesn't show any functionality.
17 It's the face of a hole. That's what it is, but it has --
18 has nothing to do with the mechanical function of what you
19 classify as the RES belt or the semi-disposable belt.

20 Q. Is it a reference that relates to the disposable belt
21 design?

22 A. I would say no.

23 Q. Okay. And since while we're talking about that, could
24 you please put up DTX-18 and 21. You can put them up side
25 by side.

Halldorsson - direct

1 So this is the design registration, the design
2 registration for the two halves of the Nox RES belt for the
3 connector; is that correct?

4 A. Are they the same or are they different?

5 Q. And the description here says that the snap-on
6 respiratory belt connector with key lock design, doesn't it?

7 A. I do see that.

8 Q. Okay. And if we could scroll, turn to the next page.
9 You can use Exhibit 18, please.

10 And is that a picture of the connector end in
11 the upper left-hand corner?

12 A. It's the -- it's the image of the face, front of the
13 face of what we call front face of a connector, but not
14 necessarily the semi-disposable connector.

15 Q. All right. Now at the bottom of the page here,
16 there's an entry discussing the exhibition priority; is that
17 correct?

18 A. I do see that.

19 Q. Now, do you see that this says this was exhibited at
20 Sleep 2008 in Baltimore?

21 A. I do read that as well as you, yes.

22 Q. Okay. So did you happen to attend the Sleep 2008
23 conference in Baltimore?

24 A. Absolutely. I was not employed with the company,
25 neither CareFusion, so I was doing something totally

Halldorsson - direct

1 different then.

2 Q. Okay. When you joined Nox as evidenced by your letter
3 to Ms. Wei, you knew about these design registrations; is
4 that correct?

5 A. These had been brought to my attention. I had not
6 seen those design documents, but I knew about the design.
7 At that time, I knew about the design, design application or
8 design documents.

9 Q. Did you ever provide information on this design
10 registration to U.S. patent counsel for Nox?

11 A. I do not remember that and I couldn't say out of the
12 thousands and thousands of documents that I've been provided
13 whether this was one of them. I couldn't say.

14 Q. Do you know if anyone at Nox provided these design
15 registrations to counsel prior to the issuance of the '532
16 patent?

17 A. I could not say whether -- whether it was or not,
18 no.

19 Q. Okay.

20 MR. ADELSON: You can take them down now.

21 BY MR. ADELSON:

22 Q. When you joined Nox, Mr. Herrmansson was an employee;
23 is that correct?

24 A. That is correct.

25 Q. And Mr. Herrmansson is no longer an employee of Nox;

Halldorsson - direct

1 is that correct?

2 A. He's not employed with Nox, no.

3 Q. When did Mr. Herrmansson leave his employment with
4 Nox?

5 A. 2014 springtime, or first half of 2014.

6 Q. Okay. Now, Nox has an arrangement where they still
7 utilize his services for consulting once in awhile; is that
8 correct?

9 A. That is correct, yes.

10 Q. And in 2014, after he left, you asked Mr. Herrmansson
11 to identify relevant patents in the field of RIP belts; is
12 that correct?

13 A. Yes. We had a conversation after he left, yes.

14 Q. Okay. And after that conversation, he then sent you
15 an e-mail listing the RIP belt patents; is that correct?

16 A. I remember that he did, yes.

17 MR. ADELSON: And, Ben, could you please put up
18 DTX-26.

19 BY MR. ADELSON:

20 Q. Now, this is a translation of that e-mail that he
21 transmitted to you; is that correct?

22 A. Yes, but I pointed out previously in depositions that
23 those translations are incredibly inaccurate. This is an
24 English translation. That is correct.

25 Q. I understood --

Halldorsson - direct

1

2

A. I pointed out that they were wrong at the deposition.

3

Q. I will represent to you and the Court that it's very

4

difficult to find a good Icelandic translator.

5

If you could please go to --

6

MR. LORIMER: If this isn't what the original

7

says, it's not proper evidence, it should not be admitted.

8

He says it's not correct.

9

THE COURT: Yes. Well, that does seem to be

10

what he's saying, and the fact that it's hard to get a

11

correct version doesn't mean, okay.

12

MR. ADELSON: It has been certified, your Honor.

13

Sorry for my levity.

14

I was just trying to -- you know, this is an

15

e-mail that's clearly directed to Mr. Halldorsson and

16

Hoskuldsson and it gave from Mr. Herrmansson.

17

MR. LORIMER: What he wants to talk about is the

18

words, and Mr. Halldorsson says the words are not properly

19

translated.

20

MR. ADELSON: You do not know what I want to

21

talk about, and I don't want to talk about --

22

THE COURT: All right. So let's not have a back

23

and forth. All right?

24

MR. ADELSON: Sorry, your Honor.

25

THE COURT: So he has got a certified

Halldorsson - direct

1 translation, so I'm going to let it in, recognizing that for
2 sure, Mr. Halldorsson does not think it's accurate and I
3 will take that into account.

4 Perhaps, Mr. Lorimer, on your cross you'll have
5 an opportunity to ask him why it's inaccurate or how it's
6 inaccurate.

7 Go ahead, Mr. Adelson.

8 MR. ADELSON: Thank you, your Honor. Again, I
9 apologize. I was just trying to have levity.

10 If we could go, please, to page 5 of this
11 document, Ben.

12 BY MR. ADELSON:

13 Q. This is an Excel spreadsheet that was attached to the
14 e-mail; is that correct?

15 A. That is correct, yes.

16 Q. And this is not a translated version. This is how it
17 was provided?

18 A. Correct. Original is written in English.

19 Q. Okay. And then if you could go on page 7, please.

20 This is an additional spreadsheet that was
21 attached to that e-mail, also all in English; is that
22 correct.

23 A. Yes. I think this is the first beige and the one you
24 showed me previously is the second page of this list.

25 Q. Okay.

Halldorsson - direct

1 A. The first of two pages.

2 Q. Now, at the time Mr. Herrmansson sent you this listing
3 in 2014, you were involved in coordinating legal activities
4 in the United States relating to Nox's patent prosecution;
5 is that correct?

6 A. I was -- yes, I was in communication with our
7 attorneys and had a conversation with them.

8 Q. Okay. And did you provide a listing of this prior art
9 to U.S. counsel?

10 A. The e-mail that is provided to me, this list that is
11 provided to me from Herrmansson is part of what I provided,
12 yes.

13 Q. All right. Are you aware that multiple references
14 on this list were not sent to the United States Patent
15 Office?

16 A. I couldn't say. Probably I didn't know at that time,
17 but I do know now. But I have to admit that the purpose of
18 this document was exactly to talk about the RIP technology,
19 and no one is ever claiming that we are claiming title to
20 the RIP technology. We are bringing our attorneys up to
21 speed what has relevance to even RIP technology.

22 Q. At the time that Mr. Herrmansson provided this list to
23 you, was he the only named inventor on the '532 patent?

24 A. That is correct.

25 Q. So this is a listing -- just to be clear, this is a

Halldorsson - direct

1 listing of references provided to you by the only named
2 inventor that did not end up on the face of the patent; is
3 that correct?

4 MR. LORIMER: Objection. I think that misstates
5 the witness' testimony.

6 THE COURT: Well, so make it less argumentative.
7 Ask him what he knows. What's on the face of the patent,
8 that's a different question.

9 MR. ADELSON: I can move on, your Honor.

10 THE COURT: Okay.

11 BY MR. ADELSON:

12 Q. In August of 2015, Mr. Herrmansson sent you an e-mail
13 with an attachment comparing the commercial embodiments of
14 the '532 patent and its earlier product, the Nox RES belt,
15 was covered by the '539 or Herrmansson patent; is that
16 correct?

17 A. I received a lot of e-mails from Mr. Herrmansson. I
18 do not know what e-mail you are referring to. It may well
19 be the case.

20 MR. ADELSON: DTX-22, please.

21 BY MR. ADELSON:

22 Q. Okay. This is an e-mail from Mr. Herrmansson to you,
23 Mr. Halldorsson; is that correct?

24 A. That is correct.

25 Q. All right. And then if you could please pull up slide

Halldorsson - direct

1 3 and 4 side by side.

2 MR. LORIMER: Your Honor, I object to this.

3 This is in October -- excuse me, April and August -- August
4 of 2015, April of 2016, after the patent issued, after the
5 duty of candor expired after the issuance of the patent.

6 THE COURT: All right. I'm going to allow
7 it.

8 It may be irrelevant, but it's being charged to
9 his time, so I'm going to spend his time doing what he
10 wants. However, let's take a time out here, because I have
11 a note from the jury. All right? So we're off the clock
12 for this.

13 So the jury sends the following note, dated
14 2:10 p.m. today. It is by my watch 2:12 p.m.

15 Your Honor, if we find claims 5 or 9 to be
16 invalid, does this affect the validity of claim number
17 one? That's what they wrote.

18 And I take it that a copy of this has actually
19 now been handed to you. Right?

20 MR. NYDEGGER: Yes, your Honor.

21 MR. ADELSON: Yes, your Honor.

22 THE COURT: So any suggestions from plaintiff as
23 to how they would like me to answer this question?

24 MR. NYDEGGER: Your Honor, it appears the jury
25 may be confused about whether claims 5 or 9 incorporate by

Halldorsson - direct

1 reference all the elements of claim 1, and that seems to be
2 the genesis behind this question.

3 And so we would request an instruction to the
4 jury that reminds them that claims 5 and 9 incorporate all
5 the elements of claim 1, and claims 5 and 9 can only be
6 found invalid if all of the claim elements from claim 1 are
7 also satisfied.

8 THE COURT: All right. What does defense think
9 here?

10 MR. REYNOLDS: I think the answer to the
11 question is yes, and that the instructions that they already
12 have incorporates what Mr. Nydegger just said, so that's
13 already in the instructions.

14 I think reiterating it would be improperly
15 pointing to -- giving them something specific. I think the
16 answer to the question is a yes-or-no question. The answer
17 I think is yes.

18 THE COURT: And as a matter of patent law, it
19 is, in fact, the case, is it not, Mr. Nydegger, that if
20 claim 5 or 9 is invalid as obvious, that claim 1 is also
21 invalid as obvious. Right?

22 MR. NYDEGGER: Assuming that the analysis is
23 performed, then, yes, that's correct. But if -- like I
24 said, this question suggests that they're performing the
25 analysis backwards, saying, we find the elements found in

Halldorsson - direct

1 claim 5 and 9, but if they had gone through all the elements
2 of claim 1 before reaching claim, the elements of claim 5
3 and 9, this question would not be answered because they
4 would have already decided the validity of claim 1.

5 So deciding the validity of claim 1 precedes
6 even arriving at this question, so the fact that they're
7 asking it, like I said, it's I think a clear indication that
8 what is going on is that they're finding that the elements
9 listed only in 5 and 9 may be taught in the prior art, but
10 that they have not performed an analysis of claim 1 to find
11 that claim invalid.

12 THE COURT: So what about this. What about if I
13 read them the paragraph that is at the bottom of page 14 in
14 the instructions, which explains the relationship of
15 dependent claims to independent claims. In particular,
16 claim 9 and claim 5 and claim 1, and followed up that by
17 saying something along the lines of, therefore, since a
18 dependent claim includes all the claim limitations of the
19 independent claim, if the dependent claim is invalid as
20 obvious, the independent claim is also necessarily invalid
21 as obvious.

22 I think that's the question they are asking.

23 MR. NYDEGGER: Well, your Honor, we would -- I
24 think that puts the horse of about the cart. It's actually
25 the other way around. Claim 9 can't be found invalid unless

Halldorsson - direct

1 claim 1 is first found invalid.

2 THE COURT: Well, no, it doesn't actually -- we
3 didn't tell them -- one of the jury instructions says you
4 don't have to do them in any particular order.

5 MR. NYDEGGER: You don't have to do them in
6 order, but like I said, you can't -- because it's
7 incorporated by reference as a dependent claim, it's
8 impossible to get to claim 5 and 9 without going through all
9 the elements of claim 1 first. So to say that if you find
10 claim 5 invalid, claim 1 must also be invalid, that puts the
11 horse before the cart.

12 THE COURT: So if I answered the question, if
13 you -- so what you would like me to say is, in order for you
14 to find claim 5 or 9 to be invalid, you necessarily have to
15 find claim 1 to be invalid?

16 MR. NYDEGGER: Yes. Yes. You must, you must --
17 well, that is a little tricky, because --

18 MR. REYNOLDS: Your Honor, I wonder whether just
19 for now pointing them back to 2.1 in its entirety. You were
20 reading from instruction 2.1. Correct?

21 THE COURT: Yes.

22 MR. REYNOLDS: That I wonder if they just were
23 directed to 2.1, if that might answer the question for them.

24 THE COURT: Hold on a minute.

25 (Pause.)

Halldorsson - direct

14:18:51 1 MR. NYDEGGER: Your Honor, looking more closely
14:18:54 2 at the question submitted by the jury, they say, does the
14:18:56 3 invalidity of claim 5 or 9 affect the validity of claim 1,
14:19:00 4 and the answer to that question is no. A dependent claim
14:19:03 5 cannot affect the validity of an independent claim. But the
14:19:11 6 reverse is true. But the way they phrased their question,
14:19:16 7 claim 5 and 9 cannot affect the validity of claim 1.

14:19:46 8 THE COURT: I'm sorry. Hold on a minute.

14:19:48 9 (Pause.)

14:20:20 10 THE COURT: Stay here a minute. I will be right
14:20:23 11 back in just a second.

14:20:24 12 (Short recess taken.)

14:20:32 13 - - -

14:20:32 14 (Proceedings resumed after the short recess.)

14:21:33 15 THE COURT: All right. Some of you, Mr. Adelson
14:21:37 16 son and perhaps Mr. Lorimer -- you all can be seated.

14:21:40 17 THE WITNESS: Thank you.

14:21:41 18 THE COURT: You may recall that one of my
14:21:43 19 brilliant ideas was to strike a couple of sentences from
14:21:46 20 page 22 of the proposed instruction, which --

14:21:53 21 MR. LORIMER: I recall, your Honor.

14:21:55 22 THE COURT: You all can be seated.

14:21:56 23 Which includes these two sentences: Because the
14:22:01 24 dependent claim incorporates all the features of the
14:22:03 25 independent claims to which it refers, if you find the

Halldorsson - direct

1 independent claim would not have been obvious, you must also
2 find the claims that depend from that independent claim also
3 would not have been obvious.

4 Conversely, if you find the dependent claim
5 would have been obvious, you must also find the associated
6 independent claim would have been obvious.

7 That's -- I don't know. I've got a black and
8 white version. One of you wanted me to say that, which is a
9 standard kind of thing. I think it's a correct statement of
10 law. I think it probably answers the question, too.

11 MR. NYDEGGER: Your Honor, that does adequately
12 answer the question and explain the law as it currently
13 stands.

14 MR. REYNOLDS: I think that's correct, your
15 Honor, yes.

16 THE COURT: So why don't I just start off by
17 responding by reading them those two sentences and send them
18 back, and if they find it confusing or whatever, they'll
19 send more notes. Okay?

20 MR. REYNOLDS: Sounds good.

21 MR. NYDEGGER: Thank you, your Honor.

22 THE COURT: All right. So, Mr. Halldorsson,
23 would you mind going and sitting back with your counsel?
24 Then we'll get the jury.

25 MR. NYDEGGER: May we bring in Mr. Hoskuldsson,

Halldorsson - direct

1 please?

2 THE COURT: If you would like, yes.

3 MR. NYDEGGER: Thank you.

4 THE WITNESS: Thank you.

5 (Witness excused.)

6 MR. ADELSON: Your Honor, excuse me. Can you
7 just instruct that no one is supposed to speak with Mr.
8 Hoskuldsson about the testimony that has been heard at very
9 point?

10 MR. LORIMER: We stipulate to that.

11 THE COURT: All right. Yes.

12 MR. ADELSON: Thank you.

13 THE COURT: Thank you, Mr. Lorimer.

14 (The jury entered the courtroom.)

15 THE COURT: Go ahead and have a seat. Yes.

16 All right. Welcome, members of the jury.

17 Everyone, you may be seated.

18 So, members of the jury, I received a note,
19 which asks, said as follows: "If we find claims 5 or 9 to
20 be invalid, does this affect the validity of claim number
21 1."

22 So I talked to the attorneys, and what we agreed
23 that I should tell you is something that I didn't instruct
24 you the first time around, but it does accurately capture
25 the law related, that's related to the topic you've raised.

Halldorsson - direct

1 Whether or not it specifically answers your question, I'm
2 not a hundred percent sure. But let me instruct you as
3 follows.

4 Because a dependent claim incorporates all the
5 features of the independent claim to which it refers, if you
6 find the independent claim would not have been obvious, then
7 you must also find that the claims that depend from that
8 independent claim also would not have been obvious.
9 Conversely, if you find that the dependent claim would have
10 been obvious, you must also find the associated independent
11 claim would have been obvious.

12 Everything else I've given you in writing, if
13 anyone would like me to read those two sentences again --
14 yes, I will read them again.

15 Because a dependent claim incorporates all the
16 features of the independent claim to which it refers, if you
17 find the independent claim would not have been obvious, then
18 you must also find that the claims that depend from that
19 independent claim also would not have been obvious.

20 Conversely, if you find a dependent claim would
21 have been obvious, you must also find the associated
22 independent claim would have been obvious.

23 All right. So thank you. Can we take the jury
24 back to the jury room?

25 (The jury was excused.)

Halldorsson - direct

14:27:14 1 THE COURT: And so, Mr. Halldorsson, if you can
14:27:17 2 come back.
14:27:18 3 Mr. Hoskuldsson, if you can leave.
14:27:21 4 My deputy clerk, if you can take what I think is
14:27:24 5 the original, it looks like the original.
14:27:26 6 And, Mr. Adelson, you can continue.
14:27:45 7 BY MR. ADELSON:
14:27:48 8 Q. Mr. Halldorsson, do you see DTX-22 on the screen
14:27:52 9 there?
14:27:53 10 A. I do.
14:27:54 11 Q. Okay. And did you ask Mr. Herrmansson to prepare this
14:27:57 12 analysis?
14:28:05 13 A. Yeah, I believe I did.
14:28:06 14 Q. Okay. And if Mr. Hoskuldsson was an inventor on the
14:28:12 15 '532 patent, why didn't you ask him to perform this
14:28:16 16 analysis?
14:28:18 17 A. Could you ask that question again, please?
14:28:20 18 If --
14:28:20 19 Q. Sure.
14:28:21 20 If Mr. Hoskuldsson was an inventor on the '532
14:28:24 21 patent, why didn't you ask him to prepare this analysis?
14:28:29 22 A. Mr. Hoskuldsson was not mentioned as an inventor on
14:28:33 23 the '532 patent when this is being requested.
14:28:38 24 Q. Okay. But he is now listed as an inventor; is that
14:28:43 25 correct?

Halldorsson - direct

1 A. That is correct.

2 Q. So his knowledge or what he did or didn't do didn't
3 change because now he's listed as an inventor; is that
4 correct?

5 A. That is a question that I could not answer. That
6 requires expertise to answer the question, I believe. But
7 it was totally obvious to me to answer -- to ask that
8 question, to ask to pull that information together.

9 Q. Now, as the date of this analysis, Natus had already
10 challenged the validity of Nox's European patent; is that
11 correct?

12 A. Remind me of the date of this one.

13 Q. August 2015.

14
15 A. Yes, I believe that was before that date. Yes.

16 Q. Okay.

17
18 A. I'm not entirely sure, but I believe I was before,
19 yeah.

20 Q. Okay. And Natus' challenge was partially based on
21 the Herrmansson earlier patent, which we've talked about as
22 the '529 patent. And when I am talking about, I mean in
23 Europe?

24 A. Yes. The Herrmansson reference, what we saw in the
25 U.S.

Halldorsson - direct

1 Q. Okay. Was Mr. Herrmansson's analysis here an attempt
2 to help you in your challenge in Europe?

3 MR. LORIMER: Your Honor, again, we're talking
4 about the U.S. Patent Office, candor to the U.S. Patent
5 Office. What happens in Europe doesn't seem to be relevant
6 to this claim.

7 THE COURT: All right. You may usually be
8 right, but I'm going to overrule you.

9 THE WITNESS: Could you repeat the question,
10 please?

11 BY MR. ADELSON:

12 Q. Was this analysis that you asked Mr. Herrmansson to
13 conduct in connection with Natus' challenge of the related
14 European patent?

15 A. I could not state whether it was or wasn't, but I
16 think it highly likely that that information has been
17 provided to the attorneys in the case in Europe as well.

18 Q. Now, Mr. Halldorsson, you were involved in the
19 decision to request a change of inventorship to the '532
20 patent; is that correct?

21 A. That is correct.

22 Q. And you even signed a statement agreeing that that
23 inventorship should be made to include Mr. Hoskuldsson; is
24 that correct?

25 A. Could you -- would not include.

Halldorsson - direct

1 Q. Should include?

2 A. Should include, yes.

3 Q. Okay. How did you come to believe that Mr.

4 Hoskuldsson should be named on the patent?

5 MR. LORIMER: Your Honor, if this question is
6 soliciting privileged communications, I object to it.

7 THE COURT: All right. Well, all right. So I
8 think the question is what did he believe, so whatever he
9 believed probably is not privileged.

10 MR. LORIMER: If that's the question, I have no
11 objection to it.

12 THE WITNESS: And now could you repeat the
13 question, please?

14 BY MR. ADELSON:

15 Q. How did you come to believe that Mr. Hoskuldsson
16 should be named as an inventor on the '532 patent?

17 THE COURT: So let me just ask it simpler: Why
18 did you believe he should be named as an inventor?

19 THE WITNESS: We had conversations with our
20 advisors. As I stated previously, there were thousands and
21 thousands of documents and copies of diaries and lab books
22 being provided as a part of our obligation, and going
23 through those documents with those advisors, that came up
24 during that conversation.

25 And I was being approached that that would be a

Halldorsson - direct

1 question, and just around Christmas, I knew those
2 conversations were taking place. I know that Mr.
3 Hoskuldsson was on vacation, and conversations were being
4 had where drawing some objects could have been, could have
5 been the nature of that discussion.

6 BY MR. ADELSON:

7 Q. Did you ever talk with Mr. Hoskuldsson directly and
8 ask him what he invented?

9 A. What time frame are you referring to now? After or
10 before.

11 Q. Let's just say at any time, did you have a
12 conversation with Mr. Hoskuldsson asking him what his
13 contribution to the '532 patent was?

14 A. After being changed inventorship, definitely, but it
15 was clear to me in my honest belief and totally the case
16 that he was not the inventor of the -- what resulted in the
17 '532 patent before that caught my attention.

18 Q. And what is it that you believe Mr. Hoskuldsson
19 contributed to the '532 patent?

20 A. It has been brought to my attention that there were
21 some sketches or images or drawings long before I joined the
22 company, at least before I joined the company, that might
23 have some reference to some embodiment that was in the '532
24 patent.

25 Q. What specific feature?

Halldorsson - direct

1 A. It had to do with the fastening mechanism of the, of
2 the elastic belt, those teeth that grab into the belt and
3 keep them firmly in place so they do not slide. Those --
4 that kind of sketches.

5 Q. But you weren't at Nox at the time that he purportedly
6 invented this; is that correct?

7 A. Invented or drafting those, drafted those sketches? I
8 was not.

9 Q. Okay. And do you -- how do you know that those
10 sketches are his sketches?

11 A. Only his word for that. I was not there at the time,
12 and obviously, during the whole process, we have had
13 conversations. I know that those sketches were in his
14 notebook. Nobody else's. And I think no one else writes,
15 or -- writes into his notebook.

16 Q. All right. During last week's trial we heard that Nox
17 has a European counterpart to the '532 patent; is that
18 correct?

19 A. Yes. There's a patent that recites from the same PCT
20 application.

21 Q. Okay.

22 MR. ADELSON: And can you bring up PTX-1027,
23 please.

24 BY MR. ADELSON:

25 Q. Is this that European equivalent?

Halldorsson - direct

14:35:27 1 MR. LORIMER: Your Honor, I don't want to burden
14:35:28 2 the Court, but I'm wondering if I might have a continuing
14:35:31 3 objection to this European stuff?

14:35:32 4 THE COURT: No. You should make objections as
14:35:37 5 you go along because maybe there's something that there will
14:35:39 6 be an objection that something can be done about, but I'm
14:35:44 7 going to continue to overrule them.

14:35:46 8 MR. LORIMER: I just don't want to trouble the
14:35:48 9 Court too much.

14:35:48 10 We object to this because this is not -- it's
14:35:55 11 not a European patent at issue, it's a U.S. patent.

14:35:58 12 THE COURT: I understand the objection.
14:35:59 13 Overruled. And when I say "overruled," if we have
14:36:01 14 post-trial briefing, you can raise these things.

14:36:03 15 MR. LORIMER: Sure.

14:36:05 16 BY MR. ADELSON:

14:36:05 17 Q. Now, Mr. Halldorsson, Mr. Hoskuldsson is not named as
14:36:12 18 an inventor on this patent; is that correct?

14:36:14 19 A. That is correct.

14:36:15 20 Q. Okay. And if you can please go to, I believe it's
14:36:25 21 page 8.

14:36:34 22 Sorry. Can you go back one page, please? Make
14:36:39 23 that a couple more. Stop there, please.

14:36:45 24 Okay. If you can blow up claim 10, please.

14:36:52 25 BY MR. ADELSON:

Halldorsson - direct

1 Q. Do you see here that this limitation of the European
2 patent includes an adjustment slot with teeth, Mr.
3 Hoskuldsson, or Halldorsson?

4 A. That is what I read, yes.

5 Q. Is that the same feature your you believe Mr.
6 Hoskuldsson contributed at the time to the '532 patent?

7 A. I believe that is, that is -- yes, the same as -- as
8 mentioned in the '532 patent.

9 Q. Okay.

10

11 A. Whether the wording is the same, I couldn't say, but
12 the embodiment, the text is the same.

13 Q. Okay.

14 MR. ADELSON: I would like to move DTX-1027 into
15 evidence.

16 MR. LORIMER: We object for the reasons
17 previously stated.

18 THE COURT: All right. Objection noted and
19 overruled.

20 (Defendant's Trial Exhibit Number 1027 was
21 admitted into evidence.)

22 BY MR. ADELSON:

23 Q. Now, Nox has not done anything to add Mr. Hoskuldsson
24 as an inventor on this patent, has it?

25 A. No, we have not. I have to admit that we seek advice

Halldorsson - direct

1 from our counsel in Europe.

2 Q. And this patent, as we've discussed, was challenged by
3 Natus previously?

4 A. I know that it was challenged, yes.

5 Q. Okay?

6 MR. ADELSON: If you can put up DTX-1025,
7 please.

8 BY MR. ADELSON:

9 Q. And this, do you recognize this document, Mr.
10 Halldorsson?

11 A. Yes, I do.

12 Q. And this is a document that was prepared by
13 Mr. Fridriksson; is that correct?

14 A. Yes.

15 Q. And do you authorize his preparation and filing of
16 this document?

17 A. Yes.

18 Q. If we look at the document, it bears the date of
19 November 23rd, 2015; is that correct?

20 A. Yes.

21 Q. If you look at the middle of the page, it says, this
22 is a response to the opposition with a that was filed
23 June 10, 2015; is that correct?

24 A. Where are you now exactly? In the second paragraph.

25 Q. The first sentence of the document?

Halldorsson - direct

1 A. Yes, I do see that.

2 Q. So Natus was challenging the document before the '532
3 patent had issued; is that correct?

4 A. That is correct.

5 MR. ADELSON: I would like to move DTX-1025 into
6 evidence, please.

7 THE COURT: All right.

8 (Defendant's Trial Exhibit Number 1025 was
9 admitted into evidence.)

10 MR. LORIMER: Objection, your Honor.

11 THE COURT: Okay.

12 MR. ADELSON: If you could go up to paragraph
13 1.1, please.

14 BY MR. ADELSON:

15 Q. All right. And this paragraph identifies that the
16 applicant for this invention was Kormakur Herrmansson; is
17 that correct?

18 A. That is correct.

19 Q. So there's no mention of Mr. Hoskuldsson at all; is
20 that correct?

21 A. That is correct.

22 Q. Now, on January 8th, 2016, you signed paperwork
23 changing the inventorship in the United States; is that
24 correct?

25 A. January 8th. Did you say 2016.

Halldorsson - direct

1 Q. Yes.

2

3 A. Yes. No. I think that was January 8th, 2017, I
4 believe.

5 Q. If you could --

6

7 A. I -- I have to apologize. Could you pull out? Do you
8 have those --

9 Q. I do.

10 MR. ADELSON: If you could put up DTX-1024 at
11 three, please.

12 BY MR. ADELSON:

13 Q. And this is the document that you signed; is that
14 correct?

15 A. Yes.

16 Q. Okay. So somewhere between the 23rd of November 2015
17 and the 8th of January 2016, Mr. Hoskuldsson suddenly became
18 an inventor; is that correct?

19 MR. LORIMER: Objection, your Honor. This is
20 argumentative. Suddenly became an inventor?

21 THE COURT: You know, your right, so I'm going
22 to strike the question. Ask it again.

23 BY MR. ADELSON:

24 Q. Between November 23rd, 2015, and January 8th, 2016,
25 Mr. Hoskuldsson became an inventor?

Halldorsson - direct

1 A. That is correct.

2 Q. Okay.

3

4 A. We applied for the correction of inventorship.

5 Q. In the United States only; is that correct?

6 A. Correct.

7 MR. ADELSON: Thank you. No further questions.

8 THE COURT: Don't feel obligated to cross just
9 because there was direct, but go ahead.

10 CROSS-EXAMINATION

11 BY MR. LORIMER:

12 Q. Now, Mr. Adelson asked you if the inventor named
13 there, the applicant named there was Kormakur Herrmansson.
14 Is that the only applicant name there?

15 A. That is the only applicant name there.

16 Q. Is Nox Medical named as an applicant?

17 A. The individual is -- the only individual is Kormakur
18 Herrmansson from Nox Medical.

19 Q. Do you know, Mr. Halldorsson, whether the requirements
20 for listing inventor in Europe are the same as they are in
21 the U.S.?

22 MR. ADELSON: Objection. Calls for a legal
23 conclusion.

24 MR. LORIMER: I asked him if he knew.

25 THE COURT: In any event, I'm going to overrule

Halldorsson - cross

1 the objection. I am not taking it as a statement of what
2 the law is in Europe as opposed to what his impression of it
3 is.

4 BY MR. LORIMER:

5 Q. Do you know, sir?

6 A. That is my impression.

7 Q. Do you think they are the same?

8 A. I think they are not exactly the same.

9 Q. Okay.

10 A. But I'm not a legal expert.

11 Q. Okay.

12 MR. LORIMER: Would you put up DTX-26, please.

13 BY MR. LORIMER:

14 Q. Do you recall that Mr. Adelson asked you some
15 questions about this? Go to the end of this where the
16 spreadsheet is.

17 Now, he asked you some questions about the
18 spreadsheet, and I believe asked you if any of those were
19 sent to U.S. counsel.

20 Do you know the content of those references?

21 A. Briefly.

22 Q. Have you read them all?

23 A. I have not read them all, no.

24 Q. Did you ever do a comparison to see how close they
25 were to the '532 patent?

Halldorsson - cross

1 A. I did not do such comparison myself, no.

2 Q. Now, Mr. Halldorsson, are you a member of the U.S.
3 Patent Bar?

4 A. Could you say that again, please.

5 Q. Are you admitted to the Patent Bar of the United
6 States Patent and Trademark Office?

7 A. No, I'm not.

8 Q. And are you a patent agent?

9 A. No, I'm not.

10 Q. Are you admitted to the European Patent Office Bar?

11 A. No, I'm not.

12 Q. Now, look at PTX-2, if you would, please. And now you
13 see there that the application for the '532 patent, the
14 application, the provisional application down here at line
15 60, were you an employee of Nox at that time?

16 A. I was not.

17 Q. Okay. Now, did you ever make any changes to the
18 claims of the '532 patent?

19 A. No, I did not.

20 Q. Prior to June 16th of 2015, did you ever have any
21 discussion with anybody anywhere about whether Mr.
22 Hoskuldsson should have been named as an inventor on the
23 application that became the '532 patent?

24 A. No, I did not.

25 Q. Prior to June 16th of 2015, did you have any reason to

Halldorsson - cross

1 believe that Mr. Hoskuldsson should have been named as an
2 inventor on that application?

3 A. No.

4 MR. LORIMER: Now, would you put up slide 102-E.

5 BY MR. LORIMER:

6 Q. This slide here shows 35 USC Section 102(e).

7 Prior to June 16th of 2015, had you ever seen
8 that before?

9 A. No.

10 Q. Did you ever talk to anybody about it before?

11 A. No, I have not.

12 Q. And prior to the issuance of the '532 patent in June
13 of 2015, had you ever heard the phrase, unity of
14 inventorship?

15 A. I had not heard that, no.

16 Q. Have you ever discussed that concept with anybody?

17 A. I have not.

18 MR. LORIMER: Now, put up DTX, I think it's
19 1017, if you would, please.

20 BY MR. LORIMER:

21 Q. Do you recognize that as the '539 patent?

22 A. Yes, I do.

23 Q. Now, prior to June the 16th of 2015, did you have any
24 understanding as to the effect on the availability of this
25 reference to be considered by the Examiner in the '532

Halldorsson - cross

1 patent as to whether Mr. Hoskuldsson had been named as a
2 co-inventor on the '532?

3 Did you have any understanding of that?

4 A. No, I didn't. I did not have an understanding.

5 Q. Did you ever talk to anybody about that prior to the
6 issuance of the '532?

7 A. No, not at all.

8 Q. Now, go back to PTX-2, if you would, for a moment.

9 All right. And you see there at the top, do you
10 see who is listed as the inventor? The person? Do you see
11 the person.

12
13 A. Yes. Kormakur Herrmansson.

14 Q. Prior to the issue date of that patent on June 16th of
15 2015, did you believe anybody else was an inventor on that
16 patent?

17 A. You are now referring to the '532 patent.

18 Q. I am?

19 A. I don't see the full extent --

20 MR. LORIMER: I'm sorry. Would you make that a
21 little bigger so he can see the rest of it?

22 BY MR. LORIMER:

23 Q. So the question is: Prior to June 16th of 2015, did
24 you have any reason to believe that anybody other than
25 Mr. Kormakur Herrmansson was a proper inventor on this

Halldorsson - cross

1 patent?

2 A. No, I have no reason to believe so.

3 Q. Go to page 2 of this, if you would, please, down there
4 on the lower right-hand corner.

5 Do you see that line that says Herrmansson on
6 it?

7 A. I do.

8 Q. Did you have any reason to believe that Herrmansson
9 '539 had not been submitted to the Patent Office prior to
10 the issuance of the patent?

11 A. No.

12 Q. Did you, prior to the issuance of the patent, did you
13 have any idea or any concept of the notion that if Mr.
14 Hoskuldsson were named as an inventor on the '532
15 application, that the '539 could not be considered by the
16 Examiner?

17 A. No.

18 Q. Did you ever instruct anybody not to name Mr.
19 Hoskuldsson as an inventor on the '532 so that the 53 --
20 Herrmansson '539 could not be considered?

21 A. No. Absolutely not.

22 Q. Did you ever discuss that with anybody?

23 A. No.

24 Q. Did you ever make a conscious decision to hide the
25 fact that Mr. Hoskuldsson should have been named as an

Halldorsson - cross

1 inventor on the '532 application so that the Examiner
2 couldn't see the '539?

3 A. No.

4 MR. LORIMER: Let's put Exhibit 18, DTX-18 and
5 21.

6 Let's start with 18. Go to the second page of
7 18, if you would, please. And go to the second page of 21
8 while your at it.

9 BY MR. LORIMER:

10 Q. Now, let's talk about the view on 18 here.

11 Does that illustration depict any of the inner
12 parts of whatever that thing is?

13 A. No, absolutely not.

14 Q. Does it disclose how an electrode snap might be
15 attached to this device?

16 A. No.

17 Q. Does it disclose how a connector wire might connect
18 with that male snap?

19 A. No, it doesn't.

20 Q. And is there any disclosure in these drawings as to
21 what the device depicted there was made out of, what
22 material?

23 A. No.

24 Q. Does it depict whether that hole that's shown there
25 was flexible or not?

Halldorsson - cross

14:50:37 1 A. No.

14:50:42 2 Q. And briefly, let's look at the other one for a minute

14:50:45 3 on 21.

14:50:48 4 Does that depict -- does that say anything about

14:50:51 5 what it's made out of.

14:50:52 6

14:50:52 7 A. No.

14:50:52 8 Q. All right. Does it depict anything about the inner

14:50:55 9 parts of it?

14:50:55 10 A. No.

14:50:55 11 Q. Or how it works?

14:50:57 12 A. No.

14:50:58 13 Q. Or how it's fastened to an electrode?

14:51:00 14 A. No.

14:51:01 15 Q. Or what kind of wiring is inside?

14:51:03 16 A. No.

14:51:09 17 Q. Now, who owns the '532 patent currently, sir?

14:51:12 18 A. Nox Medical.

14:51:15 19 Q. Now, after Mr. Hoskuldsson was named an inventor, who

14:51:18 20 owned the '532 patent?

14:51:21 21 A. Nox Medical.

14:51:22 22 Q. Did it make any difference whether Mr. Hoskuldsson was

14:51:25 23 or was not named as an inventor in terms of who owned the

14:51:29 24 patent?

14:51:35 25 A. No. The ownership is Nox Medical.

Halldorsson - cross

1 Q. Okay. Are you aware that there was an IPR proceeding
2 filed in which Natus challenged the validity of the '532
3 patent?

4 A. Oh, yes, I was.

5 Q. And were you involved in that?

6 A. Yes.

7 Q. Are you aware that one of the grounds that they
8 asserted in that IPR was the Herrmansson '539 patent?

9 A. Yes, I am.

10 Q. Let's put up PTX-108.

11 MR. LORIMER: Your Honor, we would ask the
12 Court to take judicial notice of this. It's an official
13 document.

14 THE COURT: It's admitted.

15 MR. LORIMER: Thank you.

16 (PTX-108 was admitted into evidence.)

17 BY MR. LORIMER:

18 Q. Mr. Halldorsson, let's go to page 6 of this document,
19 if you would.

20 Do you see the first reference there?

21 A. Yes, I do.

22 Q. Is that the Herrmansson '539 patent?

23 A. Yes.

24 Q. It's listed as a 102(e) reference?

25 A. That is correct.

Halldorsson - cross

1 Q. Okay. Now, do you know whether the PTAB instituted
2 trial based on that reference?

3 A. Yes, they did.

4 Q. On the Herrmansson '539?

5 A. Excuse me? Could you repeat the question, please.

6 Q. Let's move on to the next section.

7 Let's go to page 11 of that decision, under
8 anticipation by Herrmansson, that paragraph, please.

9 Here you see that the Patent Trial and Appeal
10 Board agreed with the patent owner, that the petitioner has
11 failed to show that it is likely to prevail based on
12 Herrmansson.

13 Do you see that?

14 A. Yes, I do.

15 Q. Let's go to now page 15, I believe it is. Blow up
16 beginning with petition -- excuse me. I think it's on page
17 14. Forgive me. We agree with the patent owner, right
18 there.

19 Now, in the middle of that paragraph, it says --
20 well, in the beginning, that first sentence, what is your
21 understanding of that first sentence in the paragraph?

22 A. That the Patent Office agrees with the patent owner
23 and finds that the Herrmansson patent does not teach the
24 limitation because the wire conductor does not penetrate.

25 Q. Okay. And at the end of the day, sort of in layman's

Halldorsson - cross

1 terms, do you know whether Nox or Natus prevailed with
2 respect to the Herrmansson '539 patent in the IPR?

3 A. Could you explain who prevailed, who won that case.

4 THE COURT: Why don't you move on. At the end
5 of the day, I don't care what his opinions are about the
6 IPR. Sorry, sir.

7 MR. LORIMER: I will move on.

8 THE WITNESS: Okay.

9 BY MR. LORIMER:

10 Q. Now, prior to the issuance of the Nox '532 patent, did
11 you review all the prior art that had been submitted?

12 A. No.

13 Q. Prior to the issuance of the '532 patent, did you have
14 any reason to believe that any relevant prior art had not
15 been submitted?

16 A. No.

17 Q. Prior to the issuance of the '532 patent, did you have
18 any reason to believe that the Herrmansson '539 patent, if
19 considered by the Examiner, would prevent the patent, any
20 claim of the patent from issuing?

21 A. No.

22 Q. During this whole process, Mr. Halldorsson, did you do
23 anything to prevent the Examiner in the '532 application
24 from considering the Herrmansson '539 patent?

25 A. No, absolutely not.

Halldorsson - cross

1 Q. Now, Mr. Adelson talked to you about the CareFusion
2 catalog.

3 Was that -- and he talked to you about the
4 semi-disposable device that was displayed in that
5 catalog.

6 Do you recall that?

7 A. I do.

8 Q. Is there any difference between that semi-disposable
9 device and what was disclosed in the Herrmansson '539
10 patent?

11 A. What is shown on the picture there is -- is what you
12 saw within the '539 patent. The physical embodiment of the
13 '539 Herrmansson patent.

14 Q. He also talked to you about the physical device, the
15 Nox semi-disposable or RES belt.

16 Is there any difference between that device and
17 what is disclosed in the Herrmansson '539 patent?

18 A. No.

19 Q. And referring to Exhibit 18 and DTX-18 and 21, which
20 are the international registrations, is there anything in
21 those documents that -- do those documents include more
22 information about the semi-disposable belt than was
23 disclosed in Herrmansson '539?

24 A. No. They disclose much less.

25 MR. LORIMER: Thank you.

Hoskuldsson - direct

1 THE COURT: Anything more?

2 MR. ADELSON: All I wish to do is move in some
3 exhibits that the witness already identified.

4 THE COURT: All right.

5 So, Mr. Halldorsson, your done. You may step
6 down. Okay?

7 THE WITNESS: Thank you.

8 THE COURT: Sure.

9 (Witness excused.)

10 THE COURT: Why don't you just treat everything
11 that has been mentioned as moved in and let's move on.

12 MR. ADELSON: Thank you, your Honor.

13 (Exhibits admitted into evidence.)

14 THE COURT: Maybe we should take a ten-minute
15 break here. Why don't we do that.

16 (Short recess taken.)

17 - - -

18 (Proceedings resumed after the short recess.)

19 THE COURT: All right. Everyone be seated.
20 Let's continue.

21 MR. ADELSON: Natus calls Mr. Sveinbjorn
22 Hoskuldsson.

23 THE COURT: All right.

24 ... SVEINBJORN HOSKULDSSON, having
25 been duly sworn as a witness, was examined and

Hoskuldsson - direct

testified as follows ...

MR. ADELSON: May I approach?

THE COURT: Sure.

(Mr. Adelson handed binders to the Court.)

MR. ADELSON: May I approach the witness, your Honor?

THE COURT: Sure.

(Mr. Adelson handed a binder to the witness.)

DIRECT EXAMINATION

BY MR. ADELSON:

Q. Thank you for being here today, Mr. Hoskuldsson.

You are one of the original founders of Nox; is that correct?

A. That is correct.

Q. And you currently the chief technology officer for Nox?

A. I am.

Q. Prior to that, you were the CEO of Nox?

A. Yes, I was the chief executive officer of Nox.

Q. And you and your wife are the largest shareholders of Nox; is that correct?

A. We don't have a major deal, but combined, we would be the largest shareholder, if you will, yes.

Q. In 2010, at the time of the provisional application that resulted in the '532 patent was filed, what firm was

Hoskuldsson - direct

15:11:28 1 Nox using for its U.S. prosecution work?

15:11:31 2 A. Excuse me. What patent are you referring to.

15:11:35 3 Q. The '532 patent?

15:11:36 4 A. Yes.

15:11:37 5 Q. When the provisional applications was filed?

15:11:39 6 A. Yes. We were using the Icelandic Patent Office

15:11:45 7 Arnason Faktor.

15:11:45 8 Q. And were you working with Mr. Karl Einar Fridriksson

15:11:50 9 at that time?

15:11:51 10 A. Yes. He was our contact at the office.

15:11:53 11 Q. And who was responsible for communicating with him?

15:11:57 12 A. It was mostly Herrmansson, so he handled all the daily

15:12:04 13 communications with arrest Arnason Faktor.

15:12:09 14 Q. Did you also communicate with Arnason Faktor?

15:12:12 15 A. They came to the office, or maybe came to the office

15:12:16 16 once in awhile and I met him there.

15:12:19 17 Q. Did you recall meeting with him and Mr. Herrmansson to

15:12:23 18 discuss the application that ultimately became the '532

15:12:27 19 patent?

15:12:30 20 A. I think there was a meeting or -- yes, with him.

15:12:39 21 Q. Did you review the draft of the application that

15:12:41 22 ultimately issued as the '532 patent?

15:12:44 23 A. The draft of the -- of the provisional.

15:12:47 24 Q. Yes.

15:12:48 25 A. Yes. I saw -- yes. I think that was before it was

Hoskuldsson - direct

1 filed, the final draft.

2 Q. Nox currently uses the firm of Workman Nydegger; is
3 that correct?

4 A. That is correct.

5 Q. And that's the only firm that does U.S. prosecution
6 for Nox at this time; is that correct?

7 A. I don't know if I have done anything to stop using
8 Arnason Faktor, something like that, but currently, yes,
9 everything through Workman Nydegger as an arrangement in the
10 U.S., yes.

11 Q. Okay. And at the time that Nox first engaged Workman
12 Nydegger, did you meet with the attorneys from Workman
13 Nydegger?

14 A. At the time of the engagement.

15 Q. Yes.

16 A. We met with them in -- regularly, sometime in -- I
17 don't know exactly the timing of it, but the initial,
18 initial -- it was just a visit, but on occasion, so I
19 talked with someone -- someone with Workman Nydegger at that
20 time.

21 Q. All right. And did you, once they were engaged, did
22 you discuss the pending applications that Nox had in the
23 United States?

24 A. Yes.

25 Q. And one of those pending applications ultimately

Hoskuldsson - direct

1 issued as the '532 patent; is that correct?

2 A. Yes.

3 Q. And did you have other pending applications at that
4 time?

5 A. I believe I did, or two.

6 Q. And have those also been transferred to Workman
7 Nydegger?

8 A. Yes, they have.

9 Q. Was Mr. Herrmansson part of those meetings when
10 Workman Nydegger became the new firm for Nox?

11 A. I don't believe he was.

12 Q. Even though he was an inventor on the '532 patent
13 application, or the application that issued as the '532
14 patent, he was not present; is that correct?

15 A. I think we engaged with Workman Nydegger after he left
16 Nox, so it was probably not.

17 Q. To your knowledge, has Mr. Herrmansson had any contact
18 with Workman Nydegger regarding that application?

19 A. Well, after this case started, for example, did the --
20 went to Iceland to question him, and Workman Nydegger was
21 there, so obviously, yes.

22 Q. Prior to the issuance of the '532 patent, do you know
23 of any contact he had between the two, between Workman
24 Nydegger and Mr. Herrmansson?

25 A. So prior to the '532 patent? No, I don't believe that

Hoskuldsson - direct

1 was the case.

2 Q. And did Nox use Arnason Faktor for its non-U.S. patent
3 prosecution matters?

4 A. Yes. At least indirectly.

5 Q. Now, in addition to the '532 patent, your listed as an
6 inventor on other patents and patent applications; is that
7 correct?

8 A. I'm listed on other patent applications, yes.

9 Q. Okay. And I would like to pull up 1, please. Is this
10 one of those applications?

11 MR. LORIMER: Your Honor, we object to this. It
12 was late identified last night and, again, I don't know what
13 it has to do with inequitable conduct on the '532.

14 THE COURT: It seems pretty marginal in terms of
15 relevance, but I will allow it.

16 BY MR. ADELSON:

17 Q. Your listed on this publication; is that correct?

18 A. Yes. Yes, I am.

19 Q. And your also listed as an inventor with Gudmundsson?

20 A. Yes. That was my other co-founder.

21 Q. Okay. And you signed an inventor's oath in connection
22 with this application; is that correct?

23 A. Yes, I did.

24 MR. ADELSON: Could you please bring up 2 and
25 put them up, side by side. Actually, bring up 2. It's just

Hoskuldsson - direct

1 a two-page document.

2 BY MR. ADELSON:

3 Q. Do you recognize this document?

4 A. I have to read it, so...

5 (Pause while witness reviewed exhibit.)

6 MR. LORIMER: Same objection, your Honor.

7 Disclosed last night.

8 THE WITNESS: Okay.

9 THE COURT: All right. I assume it has
10 something to do with his purported knowledge, so I will
11 overrule it.

12 THE WITNESS: Okay. Yes. It's probably the
13 declaration for the patent application and power of
14 attorney.

15 BY MR. ADELSON:

16 Q. And in the middle of this text that has been blown
17 up, do you see that your acknowledgments to disclose
18 information which is material to the patentability of the
19 application?

20 A. Yes.

21 Q. Okay. And that's in accordance with the rules of the
22 Patent Office; is that correct?

23 A. Yes, it is.

24 Q. All right. And you signed this document; is that
25 correct?

Hoskuldsson - direct

1 A. Yes. Probably. It's a long time, so -- this must be
2 the document that I signed when I got Arnason Faktor in the
3 case.

4 MR. ADELSON: If you could blow up the signature
5 block, please.

6 THE WITNESS: Okay. Yes. That's my signature.

7 BY MR. ADELSON:

8 Q. Okay. So you signed this document in 2012; is that
9 correct?

10 A. Yes, I did.

11 Q. And that was during the period of time before the '532
12 patent issued; is that correct?

13 A. That was before the -- the '532.

14 Q. The patent issued; is that correct?

15 A. We issued that in 2010, did we.

16 Q. Well, you filed it 2010?

17 A. Yes.

18 Q. And it issued in 2015?

19 A. Yes, yes. Your right. Yes.

20 Q. Okay. So during --

21

22 A. Yes.

23 Q. -- the pendency of that application?

24 A. Yes.

25 Q. So at that time you were then familiar with the duty

Hoskuldsson - direct

1 to disclose material information; is that correct?

2 A. In this document, yes.

3 MR. ADELSON: Could you please bring up IVC-3,
4 please?

5 BY MR. ADELSON:

6 Q. You have another application in your name; is that
7 correct?

8 MR. LORIMER: As irrelevant as this is, it's
9 certainly cumulative.

10 THE COURT: Well, it's all true. Overruled.

11 THE WITNESS: Yes.

12 BY MR. ADELSON:

13 Q. This is another application; is that correct?

14 A. It is.

15 Q. Okay. And you also signed an inventor's oath in
16 connection with this application; is that correct?

17 A. Yes. I believe I did.

18 Q. All right. So at least on two occasions you have
19 signed an inventor's oath attesting to your understanding
20 about the duty to disclose material information; is that
21 correct?

22
23 A. I signed the oath, yes.

24 Q. Did you ever sign an oath in connection with the '532
25 patent?

Hoskuldsson - direct

1 A. I don't believe I did.

2 Q. Okay. And on this application, you have two other

3 co-inventors; is that correct? Mr. Hallgrimson,

4 Mr. Sigurdason?

5 A. That is correct.

6 Q. How did you know you were an inventor on this

7 application?

8 A. Well, this is actually my expertise, so I'm engineer

9 of -- with -- I've learned about signal processing and stuff

10 like that, and this definitely is something that I was

11 heavily involved in, so I would say I was the primary

12 inventor on this one. The other guys helped me out. So

13 it's very different than what we've been talking about, the

14 '532 patent, for example.

15 Q. Okay. Your contention is you helped out

16 Mr. Herrmansson on the '532 patent?

17 A. I discussed the '532 patent with Herrmansson but I was

18 not the assistant.

19 Q. Now, prior to the development of the Nox disposable

20 belt, Nox sold a different belt; is that correct?

21 A. Yes.

22 Q. And in this case, we've talked about it as the Nox RES

23 belt and the semi-disposable belt; is that correct?

24 A. That is correct.

25 Q. Okay. And that was sold in the United States as early

Hoskuldsson - direct

1 as January of 2009; is that correct?

2 A. Yes. It was exported to the States in January of
3 2009, I believe. From March maybe, something like that.

4 Q. And it was also advertised for sale in the CareFusion
5 catalog as early as March of 2009; is that correct?

6 A. Yes.

7 Q. And did you provide a copy of the 2009 CareFusion
8 catalog to U.S. patent counsel?

9 A. No. It was actually described in the '539 patent or
10 the Herrmansson patent, so we believed we disclosed
11 everything by -- using that patent as a reference.

12 Q. Do you understand that the duty of candor requires
13 that all material references be submitted to the Patent
14 Office?

15 MR. LORIMER: That's a misstatement of the law,
16 your Honor.

17 THE COURT: Well, he can ask the question
18 anyhow.

19 THE WITNESS: Did I --

20 BY MR. ADELSON:

21 Q. Do you understand that the duty of candor under 37 CFR
22 1.56 requires what you attested to your agreement, requires
23 that all material art be submitted?

24 A. Well, I'm no lawyer, but I understand that you are
25 supposed to acknowledge or to notify the Patent Office about

Hoskuldsson - direct

1 any prior art. But to what degree, I don't know what is
2 expected to be, let's say --

3 Q. Okay. Are you familiar with the phrase belt and
4 suspenders?

5 A. Sorry.

6 Q. Are you familiar with the phrase belt and suspenders?

7 A. Belt and suspenders. Like suspenders for holding up
8 trousers.

9 Q. Exactly.

10
11 A. Yes.

12 Q. You're an engineer?

13 A. Yes, but maybe not a word I use every day. Yes, I
14 know what that is.

15 Q. Okay. So when someone talks -- have you ever heard
16 that in the context of engineering?

17 A. Suspenders? I don't believe I did. Not to -- not to
18 my -- what I recall now at least.

19 Q. Okay. Have you ever as an engineer, when you've
20 designed things, you put some redundancy into your design?

21 A. We do that all the time.

22 Q. Okay. Do you understand that if you submit a single
23 reference to the Patent Office and for maybe a reason you
24 don't even know, it's not considered, the Patent Office then
25 will have no basis to properly evaluate the patent?

Hoskuldsson - direct

1 MR. LORIMER: Your Honor, speculation,

2 foundation. It calls for a legal conclusion.

3 THE COURT: All right. Overruled.

4 THE WITNESS: We basically trust the Patent

5 Office that we -- we -- that we engage to -- sorting out

6 what to -- how to notify the Patent Office and stuff like

7 that.

8 So it is basically really provides everything

9 that they ask for and that's it. So in this case, for

10 example, you are asking if -- the question was what? If I

11 knew of the --

12 BY MR. ADELSON:

13 Q. If the Patent Office could evaluate certain prior art
14 if you didn't provide it? Would that be possible?

15 A. If you provide a full description, then why would you
16 provide a half description?

17 Well, I know what you are asking for, but the --
18 the truth is that we believed that it was all in the '539
19 patent. It had the drawings. It had everything. So we
20 believed it was complete.

21 Q. Do you believe that the disclosures of the '539 patent
22 are identical to what you can learn from the physical
23 device?

24 A. Well, to the degree, that is very well to the case
25 against.

Hoskuldsson - direct

1 Q. Can you tell from the '539 patent that it is the, the
2 connector end is a molded piece of plastic?

3 A. I'm -- I don't have the claims exactly in my mind, but
4 if you say that it was injection molding --

5 Q. Just molded.

6
7 A. Just molded? Okay. So molded is at least a word that
8 would help the Patent Office to understand what it meant.

9 Q. Now, in the -- you understand that there is a -- there
10 has been a challenge to the European equivalent of the '532
11 patent?

12 A. There was a challenge in Europe, but it's not an
13 equivalent patent. It has different claims.

14 Q. It's based on the same subject matter; is that
15 correct?

16 A. Yes. But other claims than the U.S. patent.

17 Q. And did Nox challenge the invalidity -- strike that.

18 In defending against that challenge, did Nox
19 make arguments that the Herrmansson reference doesn't teach
20 injection molding?

21 A. Well, I don't recall exactly the details of that case,
22 so sorry about --

23 Q. If I were to tell you that those arguments were made,
24 would you be surprised by that argument?

25 A. I did not -- injection molding?

Hoskuldsson - direct

1 THE COURT: So most of the time I'm willing to
2 go with that kind of question, but not here.

3 MR. ADELSON: Okay.

4 BY MR. ADELSON:

5 Q. Now, Mr. Hoskuldsson, when a male snap is inserted
6 into the electrode belt of the '539 patent, does it pass
7 through the two wires that are present in that device, the
8 wire spring?

9 A. The wires, and they snap back. Obviously, they snap.

10 Q. Okay. So it must make contact with the lateral
11 surface of the male snap that's inserted; is that correct?

12 A. The male snap touches the wires, yes. Also after
13 being inserted.

14 Q. And the contact is on the lateral surface of it; is
15 that correct?

16 A. Lateral surface? You mean --

17 Q. This side of the male snap?

18 A. Of the male snap? Yes.

19 Q. Now, Nox also holds a design registration that relates
20 to the Nox RES belt; is that correct?

21 A. Yes. I believe the -- the hole shape or keyhole
22 shape. Okay.

23 MR. ADELSON: Could you put up 18 and 21,
24 please. And if you could go to page 2 on both.

25 BY MR. ADELSON:

Hoskuldsson - direct

1 Q. And these are those design registrations; is that
2 correct?

3 A. Yes.

4 Q. All right. And it's classified, if we look underneath
5 the picture, as a respiratory belt connector; is that
6 correct?

7 THE COURT: All right. So I think we're going
8 to take another pause. The jury has a verdict. So I think
9 is everybody here that we need to take the verdict?

10 MR. NYDEGGER: Yes, your Honor, on plaintiff's
11 side.

12 THE COURT: All right. So, Mr. Hoskuldsson, why
13 don't you step down and go back and sit in the audience, and
14 we'll bring the jury in.

15 (Witness excused.)

16 (The jury entered the courtroom.)

17 THE COURT: All right. Members of the jury,
18 welcome back.

19 Everyone, you may be seated.

20 Madam foreperson, has the jury unanimously
21 agreed upon a verdict?

22 THE FOREPERSON: Yes, your Honor.

23 THE COURT: All right. I'm going to ask the
24 deputy clerk to go over and get the verdict from you.

25 All right. I'm going to ask the deputy clerk to

Hoskuldsson - direct

1 announce the verdict. Actually, the official word is you
2 publish the verdict. So I say that because after the
3 verdict is read, it's possible you will be asked whether you
4 individually agree with the verdict, so listen carefully to
5 make sure it is the verdict that you have agreed with. All
6 right?

7 DEPUTY CLERK: In the United States District
8 Court for the District of Delaware, Nox Medical Ehf versus
9 Natus Neurology, Inc., Civil Action 15-709-RGA.

10 Number 1, has Natus proven by clear and
11 convincing evidence that any of the following claims of the
12 U.S. Patent Number 9,059,532, the '532 patent, is invalid
13 because it would have been obvious to a person of ordinary
14 skill in the art at the time of the invention in light of
15 the following prior art references and combinations of
16 references?

17 Check yes or no on the appropriate box below.

18 Claim 1, Nox semi-disposable/RES belt, no.

19 Nox semi-disposable/RES belt and McIntire, no.

20 Claim 5. Nox semi-disposable/RES belt, no.

21 Nox semi-disposable/RES belt and McIntire, no.

22 Claim 9. Nox semi-disposable/RES belt, no.

23 Nox semi-disposable RES and McIntire, no.

24 What amount of damages should be awarded to Nox
25 Medical to compensate for the infringement by Natus?

Hoskuldsson - direct

15:32:20 1 \$623,175. (\$2.10 per belt x 296,750 units.)

15:32:34 2 Number 3, has Nox Medical proven by a

15:32:37 3 preponderance of the evidence that Natus infringement was
15:32:40 4 willful?

15:32:41 5 Yes.

15:32:42 6 THE COURT: All right. Are there any requests?

15:32:47 7 MR. NYDEGGER: No, your Honor.

15:32:49 8 MR. REYNOLDS: No, your Honor. Thank you.

15:32:51 9 THE COURT: All right. So, members of the jury,
15:32:53 10 that concludes your service on this case.

15:32:55 11 I do on behalf of the Court and the parties want
15:32:59 12 to thank you for your time last week and this week and your
15:33:03 13 attention during trial, and to emphasize that we really do
15:33:09 14 count on juries composed of people such as yourselves to
15:33:16 15 reach verdicts and dispense justice, because that's what you
15:33:20 16 are doing when the parties can't resolve matters between
15:33:24 17 themselves.

15:33:25 18 So I thank you, and I'm going to take you out or
15:33:32 19 have you taken out. I'm just going to come back and thank
15:33:35 20 you personally in just a minute also.

15:33:37 21 All right. Can we take the jury out, please?

15:33:40 22 (The jury was excused.)

15:33:56 23 THE COURT: All right. So we'll be in recess
15:33:59 24 while I go back and thank the jury. I don't know how long
15:34:09 25 it will be. It might not be very long.

Hoskuldsson - direct

(Short recess taken.)

- - -

(Proceedings resumed after the short recess.)

THE COURT: All right. Let's get Mr.

Hoskuldsson back on the stand.

BY MR. ADELSON:

Q. Now, Mr. Hoskuldsson, we were discussing that both of these references relate to respiratory belt connectors; is that correct?

A. Yes. Yes, it does.

Q. Okay. And do you see at the bottom that there's a section entitled exhibition priority?

A. Yes, I do.

Q. And you attended the Sleep 2008 Conference in Baltimore, Maryland in June of 2008?

A. We did with the intention of having a booth there, but we never set up.

Q. And Mr. Herrmansson accompanied you on that trip; is that correct?

A. Yes, I believe he did.

Q. And while you were there at the Sleep 2008 conference, you showed the Nox RES belt to representatives of CareFusion, I believe it may have been called Cardinal Health at that time; is that correct?

A. We showed them belts that we had at the time, but I

Hoskuldsson - direct

1 believe -- well, in the other case, I expect we only got the
2 RES belt from Sinbon in, I would like to say late June 2009,
3 when we -- sorry. 2009.

4 Q. This was in 2008?

5 A. Yes. Late 2008 where we got the first belts or, yes,
6 from Sinbon, so I'm not sure what -- but I'm not sure what
7 we showed them.

8 Q. Okay. But you did show Cardinal Health a belt at that
9 time; is that correct?

10 A. We showed them what we had.

11 Q. And we'll come back to that in a moment.

12 Prior to the Nox RES belt, there was a belt that
13 has been referred to in this litigation as the PRIT belt or
14 the metal snap belt.

15 Do you know what I'm speaking of?

16 A. You are speaking of the concept prototype, yes.

17 Q. Okay. And you brought that belt to a conference in
18 Florida, the Pediatric Sleep Conference that was held in
19 Florida in March of 2008; is that correct?

20 A. In March 2008, yes.

21 Q. Okay. And you displayed that prototype belt at that
22 conference; is that correct?

23 A. Yes.

24 Q. Okay.

25 MR. ADELSON: Could you please bring up

Hoskuldsson - direct

1 Exhibit 56, please.

2 BY MR. ADELSON:

3 Q. And that's a picture of you attending that conference;
4 is that correct?

5 A. That is correct.

6 MR. ADELSON: Okay. Could you please bring up
7 Exhibit 205 and -- sorry, 201 and 202, please.

8 BY MR. ADELSON:

9 Q. And that is a picture of that device that was shown in
10 Florida; is that correct?

11 A. At least the early prototype. Yes. Most likely.

12 MR. ADELSON: I would like to move Exhibits 56,
13 201 and 202 into evidence.

14 MR. LORIMER: No objection.

15 THE COURT: Admitted without objection.

16 (Exhibit Number 56, 201 and 202 were admitted
17 into evidence.)

18 BY MR. ADELSON:

19 Q. Now, you attended the conference in Florida in March
20 of 2008; is that correct?

21 A. March of 2008? Yes, I believe so, yes.

22 Q. And then you were in Baltimore in June of 2008?

23 A. Yes.

24 Q. And when I previously asked you if you showed the RES
25 belt to individuals at CareFusion, you said you didn't think

Hoskuldsson - direct

1 you had shown that. You showed a different belt?

2 A. Well, I'm -- this was the belt that we had in March.

3 We had the first manufacturing of the semi-disposable in

4 June. I remember that very well, because I went to China to

5 collect it myself because we were getting certification of

6 the company at that time.

7 So this is in between, and it was this belt or

8 if it was a semi-belt, I can't say exactly which belt we

9 showed them, this belt or the other belt.

10 Q. Understood. You showed them one or the other; is that

11 correct?

12 A. Yes. We showed them what we had at the time. If it

13 was this belt or of the -- if we already got the other belt,

14 I can't say.

15 Q. Okay. There wasn't a third belt, was there?

16 A. Between those? Not that I recall.

17 Q. You don't know or there wasn't?

18 A. It was ten years ago, and we were -- I don't know of

19 any other belt than those two.

20 Q. Now, did you provide information about the PRIT belt

21 or the metal snap belt that we see here to the Patent

22 Office?

23 A. This belt.

24 Q. Yes.

25

Hoskuldsson - direct

15:41:43 1 A. No.

15:41:44 2 Q. Did you provide it to your U.S. counsel prior to the

15:41:47 3 issuance of the '532 patent?

15:41:51 4 A. I don't believe we did.

15:41:52 5 Q. Okay. It includes a flexible textile belt; is that

15:41:55 6 correct?

15:41:55 7 A. It is, yes.

15:41:57 8 Q. But it has a flexible textile belt; is that correct?

15:42:01 9 A. Yes.

15:42:01 10 Q. With a wire woven there in?

15:42:05 11 A. It has a wire woven in the textile belt, yes.

15:42:09 12 Q. It has a molded or a plastic end connector; is that

15:42:12 13 correct?

15:42:13 14 A. The end connector -- well, plastic with a metal snap.

15:42:18 15 Q. And you are now named an inventor on the '532 patent;

15:42:24 16 is that correct?

15:42:25 17 A. Now what.

15:42:27 18 Q. You are now named as an inventor --

15:42:30 19

15:42:30 20 A. Yes. Yes.

15:42:30 21 Q. And you first identified yourself as an inventor in

15:42:33 22 January of 2016; is that correct?

15:42:36 23 A. Yes, that's correct.

15:42:39 24 MR. ADELSON: If you could please put up

15:42:41 25 DTX-1024. Yes, at two.

Hoskuldsson - direct

1 I would like to move DTX-1024 into evidence.

2 THE COURT: All right.

3 MR. LORIMER: No objection, your Honor.

4 (Defendant's Trial Exhibit Number 1024 was
5 admitted into evidence.)

6 BY MR. ADELSON:

7 Q. This is your signature here, Mr. Hoskuldsson?

8 A. It is.

9 Q. And if we could take a look at the -- well, first of
10 all, during testimony during trial last week, you testified
11 that you did not invent anything in claim 1 of the '532
12 patent; is that correct?

13 A. That is correct.

14 MR. ADELSON: Okay. If you could please pull up
15 the '532 patent, DTX-1001. And if you could go to the back
16 page of that, or the second-to-last page of that patent.
17 Okay.

18 BY MR. ADELSON:

19 Q. Now, at the time that the '532 patent, the earliest
20 application was filed, textile belts with wires woven there
21 in were well-known; is that correct?

22 A. That is correct.

23 Q. All right. So what I'd like to understand, Mr.
24 Hoskuldsson, is, what is the specific thing that you
25 believe you contributed to the claimed invention of the '532

Hoskuldsson - direct

1 patent?

2 A. So which claim I contributed it to.

3 Q. Yes, please.

4

5 A. Well --

6 Q. Well, if it's easier, could you just tell me without
7 me reading the claim language what it is you think you
8 contributed?

9 A. I think I contributed the using teeth to adjust the
10 size of the belt.

11 Q. Okay. So the '532 patent includes a claim for a slot
12 having teeth for adjusting the length of a belt; is that
13 correct?

14 A. It does.

15 Q. And that is what you believe you invented?

16 A. At least the teeth, yes.

17 Q. Okay. The RES belt includes a lot for adjusting the
18 length of a belt; is that correct?

19 A. You mean the Velcro section.

20 Q. There is a slot present in the connector of the RES
21 belt device; is that correct?

22 A. Yes.

23 Q. And the flexible textile belt goes through that slot;
24 is that correct?

25 A. It does.

Hoskuldsson - direct

1 Q. Okay. Have you -- can you briefly describe the
2 circumstances under which you came up with the idea for
3 teeth in a slot?

4 A. Yes. So basically, there are the four of us, like
5 seven of us sitting together. So my partner at the desk was
6 Mr. Herrmansson, of course working on this design. And he
7 was -- came up with an idea about how to adjust the size of
8 the belts. I didn't think it would work because it would
9 ruin the belt.

10 He asked me about it. I gave another opinion,
11 and I sketched in my notebook a picture of teeth instead of
12 using friction, as he was thinking about doing.

13 Q. So Mr. Herrmansson had a different idea how to adjust
14 the length of the belt?

15 A. Yes.

16 Q. And what exactly was that idea?

17 A. So his original idea was just to have a slot, but
18 only have a very narrow slot so that the friction of the
19 belt would be sufficient to stop it from, you know, sliding
20 back.

21 So -- but what I thought, at least I think I
22 thought at the time was that the -- because the disposable
23 belt is very, you know, loose fabric, it would ruin the
24 belt. So if you would pull it through friction, a very
25 small hole, it would actually, you know, ruin the belt when

Hoskuldsson - direct

1 you would take it through.

2 So it had to be like a wide slot so you wouldn't
3 like damage, and then you would need teeth to hold it so it
4 would slide back.

5 So that was the concept, I guess.

6 Q. Had you ever previously seen a slot with teeth to
7 adjust the belt length?

8 A. Slot with teeth to adjust the belt length.

9 Q. Yes.

10

11 A. Well, I've seen teeth. Some belts, they have like,
12 you know, a clasp with teeth, and teeth are used widely in
13 industry, I guess.

14 Q. Earlier I was asking you about suspenders.

15

16 A. Yes, you did.

17 Q. And do those have slots with teeth in there for
18 adjusting the length of a woven fabric material?

19 A. Do they have lots with teeth? I thought they had like
20 a -- like a lid that stops them from sliding back.

21 Q. Some do. Do others have a slot with teeth?

22 A. A slot with teeth? I mean, I don't know.

23 Q. Okay.

24

25 A. Maybe.

Hoskuldsson - direct

1 Q. Now, before you said you met with Mr. Fridriksson
2 during the preparation of the application for the '532
3 patent.

4 Do you remember testifying to that?

5 A. I met with him at least once, yes.

6 Q. And you said you reviewed the application before it
7 was filed; is that correct?

8 A. Yes, I did.

9 Q. And what I don't understand is how come you didn't
10 identify that you were an inventor at that time?

11 A. Well, just like you said, those teeth are tiny, tiny
12 little detail. That wasn't the invention. The invention
13 was really, you know, claim 1. It was about creating a new
14 type of electrical connector separating the function of the
15 snap and the connection of the electrical connectivity,
16 solving problems with quality and stability and
17 manufacturing cost and that was the invention.

18 Those suspenders, things that I added, it is
19 really just a tiny detail, so I didn't really consider
20 myself as an inventor of the patent.

21 MR. ADELSON: Could you please pull up DTX-1019
22 at 15.

23 And can you zoom in on claim 10.

24 BY MR. ADELSON:

25 Q. So this is what you've just described as what you

Hoskuldsson - direct

1 believe your inventive contribution was?

2 A. Yes.

3 Q. Okay. And if we can go back to page 2 of this
4 document.

5 All right. And this is the provisional
6 application that was filed. Okay. Correct.

7
8 A. I believe so.

9 Q. Okay. So at the time of filing, there was a claim
10 directed to what you believe is your contribution; is that
11 correct?

12 A. Yes.

13 Q. Okay. But at that time, you still didn't identify
14 yourself as an inventor; is that correct?

15 A. No, I did not.

16 Q. Mr. Herrmansson was the original named inventor on the
17 '532 patent; is that correct?

18 A. Yes.

19 Q. All right. And he was a Nox employee; is that
20 correct?

21 A. Yes.

22 Q. And he left in early 2014; is that correct?

23 A. I believe that's true, yes.

24 Q. But even to this day, Nox sometimes engages
25 Mr. Herrmansson for consulting; is that correct?

Hoskuldsson - direct

1 A. Yes. He's a very good friend of mine and he comes in
2 if I need him.

3 Q. All right. And did you ask Mr. Herrmansson for
4 assistance in connection with responding to an office action
5 issued by the Patent Office during prosecution of the '532
6 patent?

7 A. Could you repeat that question.

8 Q. Did you ask Mr. Herrmansson for assistance in
9 preparing a response to an office action that was issued in
10 connection with the application of the '532 patent?

11 A. Yes.

12 Q. And Mr. Herrmansson sent you an e-mail in October of
13 2014 with a listing of patents related to RIP belts; is that
14 correct?

15 A. To me or Mr. Halldorsson that was the CEO at the time,
16 so it is -- probably, he did, yes.

17 Q. Okay. And did you provide the list of references that
18 were attached to that e-mail to your U.S. counsel at that
19 time?

20 A. So did we send the list to the -- to -- to Workman
21 Nydegger.

22 Q. Yes.

23

24 A. Yes, we did.

25 Q. Okay.

Hoskuldsson - direct

15:51:45 1

15:51:45 2 A. I believe so, or I didn't personally, but I believe we

15:51:49 3 sent the list.

15:51:50 4 Q. Who do you believe sent it if you did not?

15:51:53 5 A. It could have been our CEO that was handling the

15:51:57 6 communications with Workman Nydegger at the time.

15:51:59 7 Q. Okay. You were not engaged in communications with

15:52:02 8 Workman Nydegger at that time?

15:52:04 9 A. At that time, they -- well, we were transferring lots

15:52:09 10 of information to them, so I delivered everything that I

15:52:14 11 was asked for. So, yes, I was in that communication

15:52:17 12 certainly.

15:52:18 13 Q. Okay. But you don't believe that you sent that list

15:52:21 14 to Workman Nydegger; is that correct?

15:52:25 15 A. I don't think I did, but I would assume that it was

15:52:29 16 Mr. Halldorsson.

15:52:31 17 Q. Now, do you know that none of the references listed by

15:52:36 18 Mr. Herrmansson except for the application, which was in his

15:52:42 19 earlier name, appeared on the face of the '532 patent?

15:52:46 20 A. Do I know the --

15:52:47 21 Q. None of the references ended up being in the file

15:52:51 22 history or considered in the '532 patent?

15:52:54 23 A. Well, I -- I didn't know that, but it's -- it's not a

15:53:07 24 surprise.

15:53:08 25 MR. ADELSON: If we could pull up DTX-26,

Hoskuldsson - direct

1 please.

2 And if you could scroll to, I believe it's the
3 fifth page. Actually, go to the seventh page, please.

4 BY MR. ADELSON:

5 Q. And if you could look at the last line. And in there,
6 if you can blow that up as big as you can, Mr. Herrmansson
7 identified the subject matter of his application as a
8 commercially successful as a reliable alternative.

9 Do you see that?

10 A. So this is the '539? Okay.

11 Q. And that's a characterization that Mr. Herrmansson
12 made; is that correct?

13 A. That's his comment, yes.

14 Q. Do you disagree with that characterization?

15 A. That it was commercially successful.

16 Q. Yes.

17

18 A. Well, it established lock support, so it was the only
19 patent that we had until we released the other one. We
20 succeeded in a way. We started up to a \$1 million business
21 at the time. But nothing compared with the -- of course,
22 the disposable belts.

23 MR. ADELSON: Okay. If you could bring up
24 DTX-25, please.

25 BY MR. ADELSON:

Hoskuldsson - direct

1 Q. And in October of 2014, you were working on a patent
2 review of the pending application; is that correct?

3 A. Is it October? Yes. Yes.

4 Q. October 1st?

5 A. Yes.

6 Q. And you were working on this in response to the U.S.
7 Patent Office's rejection of those claims; is that correct?

8 A. I think around the time that we were transferring the
9 engagement to Workman Nydegger, and at that time we created
10 a lot of documents to explain -- well, to our new
11 co-workers, everything about the history and how things
12 worked. I believe we did this document in connection with
13 that.

14 Q. Okay.

15 MR. ADELSON: If you could go to page 4, please.
16 And if you could go down to the last paragraph and blow that
17 up, please.

18 Actually, go up to the one before it. I'm
19 sorry. That one, yes. That's the right one.

20 BY MR. ADELSON:

21 Q. This is a section of your report; is that correct?
22 And if you could just look at the last sentence.

23 In this sentence you agree with
24 Mr. Herrmansson's assessment that the belts however became
25 very popular with the Nox products?

Hoskuldsson - direct

15:56:12 1 A. Yes. They resolved some of the problems.

15:56:18 2 Q. Okay.

15:56:18 3

15:56:18 4 A. Yes.

15:56:20 5 MR. ADELSON: And if you could now close that
15:56:23 6 and go up to the 2.1.1 paragraph.

15:56:29 7 BY MR. ADELSON:

15:56:30 8 Q. Now, in this paragraph, you identify a patent to a
15:56:33 9 company called RespiTrace?

15:56:35 10 A. Yes.

15:56:39 11 Q. And you also identified there was a product made by
15:56:42 12 RespiTrace; is that correct?

15:56:43 13 A. I think they were both --

15:56:48 14 Q. Okay. And this is a section of your report --

15:56:49 15

15:56:50 16 A. Yes.

15:56:50 17 Q. -- on the patent review --

15:56:55 18

15:56:55 19 A. Yes.

15:56:56 20 Q. -- entitled "Background." Is that correct?

15:56:57 21 A. Yes.

15:56:57 22 Q. Did you provide U.S. Patent 5,543,012 to U.S. counsel?

15:57:07 23 A. This is something we provided to our patent

15:57:12 24 specialist, so I was not in connection with the U.S. Patent

15:57:17 25 Office, no.

Hoskuldsson - direct

1 Q. All right. And you have samples of this product at
2 all?

3 A. Did we -- did Nox have samples of that product.

4 Q. Yes.

5
6 A. I believe we did, yes.

7 Q. Okay. Did you provide samples of those to either your
8 U.S. counsel or the U.S. Patent Office?

9 A. I'm not -- definitely not to the U.S. Patent Office.
10 I've never been in touch with the U.S. Patent Office.

11 Q. Neither appear on the '532 patent; is that correct?

12 A. Probably, yes.

13 Q. Probably yes or probably no?

14 A. No. I'm saying I'm not exactly sure what appears
15 there, but that's probably true, that these were not listed
16 as -- it might have.

17 Q. Okay.

18 MR. ADELSON: I would like to move Exhibit
19 DTX-25 into evidence.

20 THE COURT: All right.

21 (DTX-25 was admitted into evidence.)

22 MR. ADELSON: And if you could go to page 7 of
23 this document, please.

24 BY MR. ADELSON:

25 Q. And if you could look at the very bottom paragraph and

Hoskuldsson - direct

1 please blow that up.

2 In this paragraph you identified the hook design
3 as important; is that correct.

4
5 A. Mm-hmm.

6 Q. And this is what you were talking about before?

7 A. Yes.

8 Q. Okay. And if you could go to page 10 of this
9 document, please.

10 And if you again could go to, at the top, the
11 first paragraph and blow that up, please.

12 And in this paragraph you comment the figures do
13 not explain well the design concept, to not demonstrate the
14 stretching mechanism based on hooks.

15 Is that correct?

16 A. Yes, that's what I say there. The initial figures,
17 they are referring to the pictures as they were at that
18 point in time based on the provisional application, I guess.

19 Q. Okay. And this is on a page titled "Review of the
20 USPTO action." Is that correct?

21 A. Okay.

22 Q. But at this time, you didn't identify yourself as an
23 inventor; is that correct?

24 A. No.

25 Q. Okay. But what you are discussing, the portion of the

Hoskuldsson - direct

1 device that you believe is your inventive contribution; is
2 that correct?

3 A. Yes.

4 Q. And if you could go to page 11, please. And under
5 Section 4.2, if you could blow that up, please.

6 Do you know what the name Uehara means.

7
8 A. What the name is? Well, it's one of the -- the
9 patents that the Examiner saw, I guess.

10 Q. Okay. In this section you do an analysis where you
11 seek to differentiate the Nox teeth design from the Uehara
12 reference; is that correct?

13 A. Okay.

14 Q. Is that correct?

15 A. Okay. Yes, yes. I'm saying that they didn't
16 understand correctly the project.

17 Q. You suggest that the claims should be written to
18 emphasize the one way stretch characteristics of the Nox
19 design; is that correct?

20 A. I'm sorry. That the --

21 Q. That the claims be written to emphasize the one way
22 stretch characteristic of the Nox design; is that correct?

23 A. Okay. Yes.

24 Q. Now, even though in 2014 you conducted this analysis,
25 you didn't realize that you were the person who came up with

Hoskuldsson - direct

1 this idea; is that correct?

2 A. Well, we did the design in 2009. I never thought of
3 me as the inventor on the product, so it just didn't occur
4 to me that that could be the case.

5 Q. Even though you did an extensive analysis here?

6 A. Extensive analysis, maybe, but then again, no, I did
7 not.

8 MR. ADELSON: If we could bring up DTX-22,
9 please.

10 BY MR. ADELSON:

11 Q. This is an e-mail from Mr. Herrmansson and it's to
12 you, and you are -- there's a chain here, but you are on
13 that chain as well as Mr. Halldorsson; is that correct?

14 A. Yes.

15 Q. And it says belt comparison, and it looks to be a
16 PowerPoint that's attached to that; is that correct?

17 A. Okay. So it's something that Mr. Halldorsson sent to
18 me coming from -- coming to Mr. Halldorsson.

19 Q. Okay.

20 MR. ADELSON: Could you put slide 3 and 4 up
21 side by side, please.

22 BY MR. ADELSON:

23 Q. Do you recognize this document?

24 A. Yes. I've seen it before.

25 Q. And was Mr. Herrmansson asked to prepare this?

Hoskuldsson - direct

1 A. I guess -- guess -- maybe. It's something that was in
2 the -- between Mr. Halldorsson and Herrmansson at the time.
3 So Petur was trying to get -- Mr. Halldorsson was trying to
4 get -- collect data, and they told me that he asked
5 Mr. Herrmansson to prepare it.

6 Q. All right. So are you saying you weren't involved in
7 that effort?

8 A. To prepare this -- this one.

9 Q. Yes.

10
11 A. Participated in preparing it? I don't think so.

12 Q. Okay. Mr. Halldorsson didn't ask you to prepare a
13 document like this?

14 A. Well, I prepared all the documents like the one you
15 showed before, but I don't recall him asking me to prepare
16 this type of document.

17 Q. Okay. And just to be clear, this is a comparison
18 between the '532 and the '539 products, the products that
19 are embodied, that embody those patents?

20 A. Okay.

21 Q. Do you agree or disagree?

22 A. Do I -- do I agree that this is a comparison between
23 those two? It looks like that, yes.

24 Q. And both are molded plastic parts, correct, with
25 webbing -- with a wire woven there in?

Hoskuldsson - direct

1 A. Both are, with plastic ends. A totally different
2 concept in functionality, so, yes.

3 MR. ADELSON: If you can pull up DTX-63 and 64,
4 please.

5 THE COURT: Mr. Adelson, you'd better wrap up in
6 about two minutes here.

7 MR. ADELSON: Okay.

8 If you can pull up 64 as well.

9 BY MR. ADELSON:

10 Q. Do you recognize these documents, Mr. Hoskuldsson?

11 A. Yes.

12 Q. All right. And did you author both of these
13 documents?

14 A. Did I author.

15 Q. Did you write them?

16 A. At least the -- it would say on the back side if I --
17 I probably did, yes. It would have been --

18 MR. ADELSON: Okay. I would like to move these
19 into evidence.

20 (Defendant's Trial Exhibit Number 63 and No. 65
21 were admitted into evidence.)

22 MR. ADELSON: And if you could go to 63 at page
23 2, and if you would blow up the top paragraph, please.

24 BY MR. ADELSON:

25 Q. And this is your -- this is an assessment of the new

Hoskuldsson - direct

1 Nox disposable device; is that correct?

2 A. So what I'm saying there is that the Embla, the
3 adaptable products --

4 Q. If you wouldn't mind, this is an assessment of where
5 it says the belts are based on the current Nox
6 semi-disposable belts; is that correct? That's regarding
7 the Nox disposable?

8 A. It says that -- yes. These belts are based on the
9 current semi-disposable belts, yes.

10 Q. Okay. And if we could go down to 64, down to the
11 Section C.

12 There's a paragraph that says, the disposable
13 belts will be a simplified form of the current
14 semi-disposable belts.

15 Do you see that?

16 A. Talking about the form, yes.

17 Q. Okay. And so again, this is a comparison you made
18 between the new design and the existing RES belt; is that
19 correct?

20 A. Yes, but I believe there's a pro forma criteria, like
21 a little bit about, specifies the difference.

22 Q. Okay. But in at least two places you said that they
23 were based on the earlier design; is that correct?

24 A. But you have to understand that the new belt had to
25 fit the regular, regular belts, the same patient.

Hoskuldsson - cross

1 So obviously, they were meant for -- to do the
2 same things. So in that way, it is based on the same
3 specification as we had for the semi belt.

4 THE COURT: All right. Thank you, Mr. Adelson.

5 All right. Any cross-examination?

6 MR. LORIMER: Very briefly, your Honor.

7 CROSS-EXAMINATION

8 BY MR. LORIMER:

9 Q. Mr. Hoskuldsson, prior to the issuance of the '532
10 patent, did you ever think you should have been named as an
11 inventor on that patent?

12 A. No.

13 Q. Did you have any understanding under U.S. law how
14 inventors are identified for U.S. applications?

15 A. At least not to the degree as a lawyer.

16 Q. What was your -- you said you were the CEO I think
17 when this application was filed; is that correct?

18 A. I was the much CEO, yes.

19 Q. And who was in charge of this project at Nox?

20 A. The development of the RIP belts? That would be a
21 product manager within Nox.

22 Q. All right. And who was more involved in the
23 day-to-day of the disposable belt, you or Mr. Herrmansson?

24 A. Well, he was the sole designer of the disposable belt.

25 Q. All right. Mr. Hoskuldsson, up until June the 16th of

Hoskuldsson - cross

1 2015, did you have any understanding as to whether your
2 being named or not named as an inventor on the '532 would
3 have any effect on whether the Herrmansson '539 patent would
4 be considered by the Examiner?

5 A. No. No way.

6 Q. Did you ever attempt to withhold or make it so the
7 Examiner couldn't see the Herrmansson '539 patent?

8 A. No.

9 Q. Mr. Adelson showed you a spreadsheet that had a bunch
10 of patents on it.

11 Did you ever compare all of those patents to the
12 claims of the '532 patent.

13
14 A. Did I -- did I do.

15 Q. Did you?

16 A. No.

17 Q. All right. Mr. Adelson asked you a couple questions
18 about the European opposition that Natus filed. Were the
19 claims in that opposition the same as the claims in the U.S.
20 case?

21 A. No.

22 Q. And were they ultimately allowed over Herrmansson?

23 A. Yes.

24 Q. We talked very briefly about the semi-disposable belt,
25 the Herrmansson '539, and the CareFusion.

Hoskuldsson - cross

1 Are the devices in those three references
2 basically the same?

3 A. It's all the same device, yes.

4 Q. And the design application that you saw, does that
5 show more or less than the Herrmansson '539?

6 A. The design application.

7 Q. The design applications that showed the pictures?

8 A. Yes. That was less. In the shape of the hole.

9 Q. He talked to you about the PRIT belt?

10 A. Yes.

11 Q. Did that have a plastic receiving hole that received a
12 stud?

13 A. No. It was a metal snap.

14 Q. Did it have a wire inside like the semi-disposable
15 belt that grabbed the stud?

16 A. Yes.

17 MR. LORIMER: Bring up PTX-2 briefly. Go to the
18 second page, if you would.

19 BY MR. LORIMER:

20 Q. There it lists Herrmansson as the second-to-last
21 reference.

22 Did you have any idea that the Examiner had not
23 considered the Herrmansson '539 prior to the issuance of the
24 '532 patent?

25 A. No.

Hoskuldsson - cross

1 Q. Prior to the issuance of the '532 patent, did you have
2 any belief as to whether the, if the Examiner considered the
3 Herrmansson '539 patent, whether that would have resulted in
4 the rejection of any of the claims?

5 A. No.

6 MR. LORIMER: Okay. I have nothing further.

7 THE COURT: Mr. Hoskuldsson, the CareFusion
8 catalog, do you understand what's pictured in that?

9 THE WITNESS: I believe so, yes.

10 THE COURT: All right. And again, can you tell
11 me what that is?

12 THE WITNESS: It is a picture of the belt that
13 we -- that is the semi-disposable belt. It's a picture of
14 the semi-disposable belt.

15 THE COURT: Is there any difference between the
16 semi-disposable belt and the picture in the CareFusion
17 catalog?

18 THE WITNESS: No.

19 THE COURT: It's just the belt is a physical
20 thing and the picture is a picture of that physical thing?

21 THE WITNESS: Yes.

22 THE COURT: Okay. Thank you.

23 Any more questions?

24 MR. LORIMER: No, your Honor. I know that there
25 has been deposition testimony submitted. Typically, at this

1 point we would make a JMOL motion.

2 THE COURT: Since I have not seen the deposition
3 testimony --

4 MR. LORIMER: Yes. That's why.

5 THE COURT: So, Mr. Hoskuldsson, I believe you
6 can step down. Your done.

7 THE WITNESS: Thank you.

8 THE COURT: Thank you.

9 (Witness excused.)

10 THE COURT: All right. So how much of this
11 deposition testimony are we talking about? Do I have it?

12 MR. ADELSON: Not yet, your Honor. We have
13 binders prepared.

14 We weren't sure if the Court wanted to receive
15 it in paper or electronic form.

16 THE COURT: Well, how many pages is it?

17 MR. ADELSON: There's designation testimony that
18 is probably a total of -- portions of 25 pages or so, but
19 then for context, we've included proceedings and a
20 subsequent page.

21 THE COURT: Well, so the things that you've
22 designated, are they highlighted in blue or yellow or some
23 other portion?

24 MR. ADELSON: The designated portions for both
25 parties are highlighted in contrasting colors, and they also

1 include a text box to indicate alongside which party
2 designated it.

3 THE COURT: Who designated doesn't make so much
4 difference. I just wanted to make sure what you are telling
5 me is it's in some kind of color other than white and black?

6 MR. ADELSON: Yes, sir.

7 THE COURT: All right. So, Mr. Lorimer, you
8 were saying?

9 MR. LORIMER: I was done saying, your Honor,
10 actually.

11 THE COURT: Okay. So do you have this 25 pages
12 plus the binder?

13 MR. ADELSON: We have those here, your Honor.

14 THE COURT: Can we get one marked and made an
15 exhibit or something?

16 MR. ADELSON: May I approach?

17 THE COURT: Yes.

18 MR. ADELSON: There's one for Mr. Herrmansson
19 and one for Mr. Fridriksson.

20 THE COURT: Okay.

21 (Mr. Adelson handed binders to the Court.)

22 MR. LORIMER: Your Honor, is there some -- when
23 the Court has completed its review of the depositions, we'd
24 like to make a JMOL, but we won't know, of course, unless
25 the Court informs us of when that is.

16:14:34 1 THE COURT: Hold on a minute.

16:14:37 2 (Pause.)

16:14:50 3 THE COURT: So I got handed up two things. One
16:14:53 4 appears to be a binder that's marked Mr. Fridriksson and
16:14:57 5 appears to have no --

16:14:58 6 MR. ADELSON: I'm sorry. I may have given you
16:15:00 7 the witness binder. I apologize.

16:15:18 8 (Pause.)

16:15:26 9 MR. ADELSON: Sorry, your Honor. There are
16:15:28 10 witness binders as well as deposition transcripts to both
16:15:32 11 (handing binders to the Court).

16:15:33 12 THE COURT: When you say 25 pages, Mr. Adelson,
16:15:51 13 your saying 25 pages in each?

16:15:53 14 MR. ADELSON: Yes, your Honor. There was over
16:15:59 15 450 pages of deposition testimony and we cut as much as we
16:16:04 16 could. We just included in the pages for context.

16:16:07 17 THE COURT: All right.

16:16:09 18 So, Mr. Adelson, before I go back and read these
16:16:37 19 50 pages of what I'm sure is highly exciting stuff, what
16:16:43 20 is the best point that you make in either of these
16:16:46 21 depositions?

16:16:47 22 MR. ADELSON: Well, your Honor, Mr. Fridriksson
16:16:52 23 was the patent agent.

16:16:53 24 THE COURT: No. I understand who he is.

16:16:56 25 MR. ADELSON: Yes. Okay. He wholeheartedly

1 admitted that when Klein gave him prior art references, he
2 took over the role of U.S. counsel. He is the man who wrote
3 the applications and wrote the claims and he has made a
4 determination regarding the materiality of prior art
5 references. So he effectively asserts the role of U.S.
6 counsel. He's not a member of the patent bar.

7 THE COURT: Is this inequitable conduct?

8 MR. ADELSON: Yes. If you are taking the
9 decisions of materiality out of the hands of U.S. counsel
10 who are registered to practice before the Patent Office and
11 withhold prior art, I would say that that is inequitable
12 conduct.

13 THE COURT: Okay. What's the best thing in
14 Mr. Herrmansson's deposition?

15 MR. ADELSON: Mr. Herrmansson, he explains that
16 he submitted documents.

17 By all accounts, it appears that Mr. Herrmansson
18 tried to do everything he could do, including sending
19 e-mails with listings of prior art to Mr. Halldorsson and
20 Mr. Hoskuldsson. Those documents have never made it.

21 THE COURT: Well, so what I don't understand is
22 this. Like you put up a spreadsheet of 15 things that
23 Mr. Herrmansson sent along as prior art that somehow or
24 other is related to, I don't know, devices for sleep
25 studies.

1 Presumably, I have no particular way of knowing
2 whether any of that is material. Right?

3 MR. ADELSON: Your Honor, there's a level of
4 materiality just based on the fact the inventor himself
5 thought that this is relevant information.

6 We believe that the Patent Office is the best
7 entity to make determinations of materiality. If the
8 inventor thinks it is something that is relevant, it should
9 then be passed onto the Patent Office.

10 So that's --

11 THE COURT: Do you have any authority for the
12 proposition that if an inventor says it's relevant, that
13 if it's not produced, that's automatically inequitable
14 conduct?

15 MR. ADELSON: Well, Mr. Herrmansson, with
16 respect to the '532 patent, is the only person who signed an
17 inventor's oath, and the inventor's oath says your supposed
18 to produce all material information.

19 As far as I can tell, I believe that
20 Mr. Herrmansson actually tried to comply with that, but
21 others upstream from him interfered with that process.

22 MR. LORIMER: Your Honor, we have to have clear
23 and convincing evidence on intent to deceive. It has to be
24 the single most reasonable inference. This clearly is not
25 that. It's not even close.

16:19:34 1 THE COURT: All right. Well, so I'm handicapped
16:19:39 2 because I've got now 50 pages of stuff to look at.

16:20:07 3 So why you all come back here tomorrow morning
16:20:12 4 at 9:00 a.m., and I will see whether or not I can tell you
16:20:16 5 what I'm thinking about all of this. Okay?

16:20:20 6 MR. ADELSON: Thank you, your Honor.

16:20:21 7 MR. LORIMER: Yes, sir.

16:20:22 8 THE COURT: All right. Also, why don't you see
16:20:26 9 if you can't agree between yourselves overnight as to how
16:20:34 10 much briefing you think you need on various motions that are
16:20:37 11 sure to be coming and also what time frame you have in mind,
16:20:46 12 though I will tell you that the time frame I have in mind
16:20:50 13 certainly requires that your briefing will be finished by
16:20:58 14 like a month from now. All right?

16:21:02 15 So we'll be in recess.

16:21:08 16 (Court recessed at 4:23 p.m.)

16:21:08 17 - - -
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